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THE LAW COURTS UNDER THE JUDICATURE ACTS.

RISING generations of lawyers will before long cease to be fully conscious of the alteration that has been effected in the legal scene during the last twenty years. The old order has changed, and has been succeeded by the new. The historic courts of the Queen's Bench, the Common Pleas, and the Exchequer, together with the composite appellate tribunal of the Exchequer Chamber, all have disappeared; and their place is taken by a Supreme Court of Judicature, divided into the High Court of Justice and the Court of Appeal. It would be a mistake to undervalue the merits of the machinery that we have abandoned, or to suppose that the superior machinery which has been substituted is free from its own special elements of weakness. The former system had defects, many of which it is to be hoped have been remedied by the reforms of later years—but these reforms have themselves produced or intensified, in their turn, evils which require either to be rectified or to be watched. The object of the following observations, which are not intended to be controversial, is to call attention to points peculiar to the development of our new system which seem to deserve serious consideration.

The business of the Queen's Bench and of the Chancery Division of the High Court is a subject that is forced into importance by the list of arrears in both. The amalgamation of the ancient Queen's Bench, Exchequer and Common Pleas, into a single Queen's Bench Division, under a single Lord Chief Justice, was a measure adopted in the hopes of increasing the efficiency and rapidity of the despatch of legal business. During a substantial portion of the year a large number of the Queen's Bench Judges are withdrawn from London by the civil and criminal circuits of the country; and the provincial demand for their presence increases rather than declines. After a

general election still further interruption to the ordinary course of the High Court is occasioned by the election petitions; and the state of the cause list in November 1885 is such as to require either an addition to the number of Common Law Judges, or such an alteration in the machinery as will enable the present number of judges to get through the business in less time than now. The former remedy is obviously one to which resort should only be had if all other measures are destined to be ineffectual. Before adopting it, it will be necessary to decide whether any internal measures of arrangement can be devised by which the administration of justice can be made more rapid without diminishing its efficiency. With the view of concentrating our attention upon the right points it may be useful to consider what, speaking roughly, the business of the Queen's Bench is, and how the labour at present is distributed.

The Queen's Bench Division discharges double functions. It is, in the first place, a tribunal of first instance where, with or without the assistance of juries, the great bulk of the Common Law litigation of the Superior Courts is brought to a final hearing. In the second place, it exercises functions of an appellate kind, being the Statutory Court of Appeal from the inferior courts of the kingdom generally, as well as the court which sets right miscarriages of justice after civil trials before a judge and jury. It is also a Court of Appeal from a judge at Chambers in interlocutory and other proceedings. Finally, it has original jurisdiction to deal with Habeas Corpus, prohibition, quo warranto, criminal information, and certain other matters that need not be enumerated. In order to discharge these duties it divides itself, when its numbers are complete, and when circuits or election petitions are not pending, nor the Old Bailey sitting, in the following manner:—Six judges devote themselves to the trial of causes with or without juries. One judge undertakes Judges' Chambers. The remainder constitute, when it is possible, three courts in Banc to dispose of the new trial paper, the appellate business of the Crown paper from Inferior Courts, the special cases and motions, including the appeals from the judge at Chambers.

The first question which naturally presents itself is the enquiry whether it would not be possible that the number of single Judge Courts which at present try Nisi Prius causes, might not be substantially increased from six to eight, or even—if need be—beyond this latter number. The only objection which has hitherto been raised to this obvious change is the absence of an adequate staff of officers to attend on more than six Nisi Prius Courts at once. If this is the real obstacle, it would scarcely appear to be one that should be allowed by a great country to stand in the way of

justice; and one may hope that the obstacle is destined in one way or another to disappear. But it is further plain that the additional judges required to preside over an increased number of Nisi Prius Courts must be drawn from the present Courts in Banc. This in course of time will necessarily involve the discussion of the subject of the present constitution of the Courts in Banc, with a view of considering whether any and what judges can be permanently spared from Banc to discharge the duties of Nisi Prius.

First and foremost comes a trenchant question, which sooner or later will have to be answered by the experienced in such matters. Need Courts in Banc ever be composed of a larger number than two judges; and if so, what is the description of business that calls for the presence of a third judge? It cannot be too clearly realised that every time a court of three sits in Banc, a judge is used for Banc purposes who, if a proper court and a proper staff of officers were furnished him, might be trying causes at Nisi Prius without juries.

In the second place it will be naturally asked whether there is any class of work that might be sent to the Court of Appeal direct, so as to relieve *pro tanto* the Queen's Bench lists. It has from time to time been suggested that motions for a new trial might be taken immediately by the Appeal Court.

In theory the plan appears excellent. It would substitute a single appeal for two appeals, and so far diminish the expenses of litigation. But the serious difficulty in the way of such a change arises from the grave doubt whether the Court of Appeal, though relieved of late from the necessity of going circuit, could possibly despatch the additional amount of business thus thrown upon its hands. As it is, the Court of Appeal sits every day in the legal year; and seldom or never rises, except on Saturdays, before four. Even with this incessant labour, the fatigue of which few who have not tried it can appreciate, it is all that the Appeal Court can do to stem the current of work that flows in upon it. During the last year, 213 motions for a new trial were decided in the Queen's Bench Division, 39 only found their way upon appeal to the Appeal Court. It would appear to follow that if motions for new trials had gone directly to the Appeal Court in the first instance, that tribunal would have 200 additional causes, many of them of a very heavy kind, added to its list in a single year. I have no hesitation in saying that, constituted as it is at present, the Appeal Court is absolutely unable to cope with anything like such an influx of fresh business. The objection to severing the New Trial motions into those which involve, and those which do not involve, misdirection on a point of law,—and of relegating the former to the Appeal Court, while reserving the latter for the

Divisional Court in Banc, is that it is exceedingly difficult to separate law from fact, and that it often would be necessary to hear the whole case out, before deciding whether the question turned on a point of pure law or not. If any change is to be made by the Queen's Bench in the organisation of its affairs, it must be sought I fear in some other direction.

We turn next to the Crown Paper and Appeals from Inferior Courts, and find ourselves face to face with the obvious enquiry whether (with certain exceptions) the bulk of this appellate business requires a Court of two judges, or might not be satisfactorily disposed of by a single judge. The matter is one which appears to be eminently worth discussion. A similar enquiry presents itself as to the special paper. Appeals from Chambers, on the other hand, necessitate a Court composed of two judges, for a single judge cannot properly sit alone in review upon the decision of one of his own colleagues. Reasons similar to those I have mentioned with reference to new trials render it practically impossible that appeals from Chambers should pass immediately to the Court of Appeal. The proposal that a judge should sit in open Court, instead of at Chambers upon appeals from the Master—whatever its advantages or disadvantages in other respects—would entail a substantial increase in costs of litigation, unless solicitors' clerks who at present have audience in Chambers were accorded a similar privilege in open Court. All that can be perhaps usefully asserted in this paper is the belief that any steps that can be taken to increase substantially the number of Nisi Prius Courts, and to man them with judges drawn from Banc would effectually reduce and probably destroy the arrears of the Queen's Bench Division.

Some portion of the arrears in the metropolitan lists is naturally due to the compulsory absence upon circuit and upon election petitions of the Queen's Bench judges. With regard to election petitions, a needless susceptibility of the legislature demands that two judges should in each case be told off to perform labours that could with equal ease and efficiency be unquestionably performed by one. The circuit system can only be regarded as at present in a state of transition, and as destined to undergo still further change. A passion for permanent local centres of justice, with judges of the High Court to preside over them, seems to have taken hold of a part of the legal profession that is resident in Lancashire and perhaps elsewhere. What may happen in the remoter future cannot be predicted. But although too much attention cannot be bestowed upon the necessity of providing amply for the circuit wants of great provincial centres, in respect not only of the local trial of Common Law, but of Equity and Admiralty witness causes, it is not perhaps presumptuous to

doubt whether counties even like Lancashire do not wholly and absolutely overrate their own wants and their annual supply of business proper to be transacted in the superior courts. It would be barely possible perhaps to occupy a permanent High Court judge throughout the legal year in Lancashire; but it could only be done by directing upon the superior courts a mass of business that could equally well be litigated in the County Court—an expense to the suitors, and a waste of judicial power that means waste of public money. The truth is that there is an obvious reform in the circuit system, equally for the advantage of the suitors and of the bar, that never yet has been tried; the abolition, namely, of civil circuits at towns of faded importance, and the concentration of civil circuit business at a limited number of important provincial centres. Whenever a government is strong enough in the House of Commons; and whenever the state of business in the House of Commons permits of a measure to be passed that must encounter much local opposition, such a reform ought to be attempted. The recent changes in the administration of business upon circuit that have provoked criticism and displeasure, represent in no proper sense of the term the real opinion of the judges under whose auspices they have been tried. The only problem on which the judges have been permitted to exercise their ingenuity is how, without consolidating the civil business on circuit, or interfering with the vested rights of the smaller towns, to perform in the same place the same amount of work with a limited number of judges. They have had to make bricks without straw. A fewer number of circuit centres for civil business, each with a substantial list of causes, would be a benefit to the bar, and a great economy of judicial time.

A change in the Long Vacation is sometimes spoken of as if it would diminish our arrears. While on the one hand the proposition that the Courts of Justice, unlike the temple of Janus, ought never to be closed, is in theory attractive; there is no subject about which there is more illusion prevalent. The judges of the land are not made of cast-iron; the judicial business of the country is performed by men who are no longer young; and having regard to the fact that it requires freshness and mental strength adequately to do justice to a difficult or complicated cause, the present writer is not prepared lightly to admit that lessening the present periods of vacation would operate beneficially to the suitors. But even if this is a partial view of the situation, and if it be true that the judges can work still harder than at present, the Long Vacation question is really outside this point. A fixed number of judges working at their utmost strength and speed can only perform a constant amount of work in the legal year. They must have some repose.

Whether this repose is taken by them all at once or in relays is a matter to which they are probably indifferent; but opening the Courts in vacation, unless the number of judges is to be increased, will not increase the amount of judicial business that can be done in the twelve months. If more courts sit in September, fewer courts will have to sit in May or February. Whether the public, the suitors, the bar, and the jurymen, special and common, who will have to give their attendance in the autumn, will benefit by the change, is a matter for the public to decide, and if the experiment is to be tried the judges will gladly do their best to accommodate themselves to the new arrangement. But unless it is an essential part of the reform that more judicial labour should be extracted from the same number of judges by shortening their holidays,—no effect can be produced on the arrears of a single court by abolishing the Long Vacation. The business powers of a court being constant, the distribution of its sittings differently will not enable it to try a single cause that it does not try at present. My own opinion is that not only are the business powers of the courts constant, but that the stream of litigation does not increase. I believe, so far at least as the Common Law Courts are concerned, that arrears are the result not of over pressure of business, but of the transition from the old system to the new, which has as yet resulted in a less complete adjustment of the legal machinery than that which may be reasonably hoped for in the course of time.

The arrears in the Chancery Division appear to be even of a more serious description, and it is probable that the creation of a new judge will form a necessary part of any remedial scheme that can be devised. But the mere appointment of another Chancery Judge would be an imperfect measure, unless accompanied by a vigorous attempt to revise the organisation of business in the existing Chancery Court; and the profession has reason to congratulate itself that the subject is one that has been reported upon by a special committee of judges and others recently appointed by the late Lord Chancellor. The Judicature Acts, that effected so large and, in many respects, so salutary a change of common law, left the administration of Chancery business still substantially in need of amendment: probably because the Lord Chancellors of the day were equity and not common lawyers. The amalgamation of the Common Law Courts into a single Queen's Bench Division has been carried out so thoroughly as to leave no branch of the Queen's Bench Judges with any special functions of their own—putting aside the single exception of the Judge in Bankruptcy. Each Common Law Judge in rotation takes his place at every part of the machine. The Chancery Division, on

the other hand, though nominally one and indivisible, still remains divided in reality into separate and independent courts, each with its single judge, and its own staff of officials. A superficial appearance of unity is preserved by the institution of the Ballot, which apportions each cause at an initial stage among the different courts; and the illusion is maintained by the occasional transfer by special order from the lists of one judge to those of another, if a block of business before any one tribunal renders such transfer necessary. I am aware that the nature of the litigation in the Chancery Division differs much from that of the litigation at Common Law, and that many of those to whose experience and wisdom we all should bow, consider that the carrying out at all events of decrees or orders, or of causes involving the continuous management of property, is best entrusted to one and the same judge; while the apportionment, by custom and agreement, of leading counsel to particular courts is a convenience and advantage to the suitor. Whether this idea partakes in any degree of the character of a Baconian idol of the forum, it would be beyond the limits of this paper to discuss. Assuming that within certain defined limits the continuance of a cause before the same judge is justified by experience, it remains a matter of pressing importance to consider whether, subject to such restrictions as are requisite to ensure this special end, delay and expense would not be materially saved by an amalgamation to a considerable extent of the Courts of the Chancery Division. The possible evils that demand attention would seem to be as follows: Each Chancery judge—except Mr. Justice North, who works in aid of all—has to discharge the entire functions of a separate Chancery Division. He has to hear witness actions, non-witness actions, motions, adjourned summonses and petitions; and to manage his own Chambers. He has constantly to lay aside one class of business in the middle, to attend to the immediate and pressing exigencies of another. The most serious illustrations of the defects of this plan occur with reference to the trial of witness actions. These trials, without any fault whatsoever of the presiding Judge, are subject not only to delay, but to inevitable and incessant interruption. It is not possible under the present system to ensure in every Chancery Court alike that a witness action shall be heard *de die in diem* till it is finished. The hardship on the suitors, who often come with their witnesses from different parts of England, can scarcely be overrated, and is of itself sufficient to make some reform a crying necessity. Causes which are earliest entered in the Chancery Division have no security that they will be earliest tried; and when the trial once comes on there is no certainty that it will not again and again be

liable to be interrupted. The subdivision into separate Courts produces, moreover, a diversity in the Chamber practice. In one set of Chambers a chief clerk decides what, in another, is decided by the judge; counsel are heard in one, in another only the solicitor or his clerk. Lastly, the interruption and adjournments of long appointments before the chief clerks produce in Chambers the same kind of delay and of embarrassment that occurs in Court among the witness causes. The Lord Chancellor's Committee has brought to bear on the question of the evils of which I have spoken, and of their possible rectification an amount of special knowledge to which I cannot pretend. But it scarcely requires an extended familiarity with the details to justify the assertion that some reorganisation and some considerable fusion of the separate Equity Courts and Chambers is needed, if delays are to be avoided, expense saved, and arrears reduced into reasonable limits.

The Judicature Acts, in perfecting the machinery of litigation, placed within the reach of every litigant a very complete weapon, but one far too elaborate and precise for the necessities of every case. The first result was to increase by something like 20 per cent. the ordinary expenses of a common law action. Discovery of documents and interrogatories, the theoretical value of which is evident, and which occasionally in practice are essential to the attainment of truth, in very many instances only added to the costs of the action without any commensurate benefit to the suitor. What was believed ten years ago by the authors of the Judicature Rules to be a simplification of pleading and an abolition of pleading technicalities turned out to be the introduction of a mode of pleading so confused and inartistic as to be in many instances only a source of embarrassment and expense. A third result of the new system has been an enormous increase of appeals, and the Appeal Court during the last three years has been staggering under a mass of arrears, more especially in the Chancery Division. The changes in the Queen's Bench that have been effected by the amalgamation of the courts have led by an inexorable logic to the multiplication of Appeals; nor is it to be forgotten that appeals inevitably tend to increase with every development of what is called the single Judge system. The three great Courts of Banc that used in former time to sit at Westminster, each under the presidency of its Chief Justice or its Chief Baron, were usually courts of four. The collective weight and experience of a tribunal of the kind were so considerable that their judgments as a rule were satisfactory, and the public and the profession acquiesced with equanimity in the state of the law which prohibited appeals in all but a specified class of cases. However special the subject-matter of the litigation, there was sure in

old days to be some one member of the court within the range of whose knowledge it fell: and the judgments of these splendid Courts of Banc made the English Law respected in every English-speaking country. Instead of Banc Courts of four, the members of which were trained to work with one another, our Divisional Courts in the Queen's Bench are now composed of three or two judges, who select in rotation the court in which they are to sit. The Crown Paper upon this plan may be dealt with by two judges whose experience at the bar and on the bench may have lain in subjects other than Crown Practice. Appeals from Chambers may be heard before two judges whose familiarity with Chamber work has been slight, though their legal acquirements in every other field of the law is above all praise. A system of rotation of the sort according to the simplest doctrine of arithmetical chances fails to ensure the presence of specialists in any particular court. A judge who is a master of Patent Law may pass half-a-dozen years upon the Bench without ever trying a patent cause; a great commercial lawyer may find himself wholly withdrawn from the subjects in which he is most interested and in which he has won his professional reputation. Thus it follows that while the judges of the present day are fully equal to their predecessors in talent and in erudition, the perhaps unavoidable method of division of labour among them may be such as to weaken the prestige of the Divisional Courts of Banc. The natural consequence is that appeals become more frequent; and as the liberty of appeal is now extended to every case, including interlocutory orders, the Appeal Court tends more and more to become the court to which litigants direct their steps, passing through the Courts in Banc below as a preliminary ordeal. The very existence of a Court of Appeal accessible to all, and the facilities of reaching it, tend to re-act perhaps on the care with which arguments are conducted in the court below, and, if our judges were not what happily they are, might easily affect the care and caution with which they decided causes in the first instance. That the multiplication of appeals, however unavoidable, is attended with many disadvantages nobody can deny; yet such multiplication naturally results from the very reforms we have adopted. Its effect is twofold. In the first place it necessarily increases, in a large percentage of ordinary actions, both the expense and the delay. In the second place it tends to make the Court of Appeal the pivot of the new system, just as the Courts of Banc were the pivot of the old, and renders the constitution and function of the Court of Appeal a matter of serious moment which can hardly have too much attention devoted to it by those who are interested in the perfection of our English administration of the law.

Two opposite views appear to be entertained as to the manner in which this all-important subject of the increase of appeals should be dealt with. According to the opinion of some a salutary check should be imposed upon the liberty to appeal by prohibiting appeals in cases where the pecuniary amount at stake falls below a certain minimum, unless special leave to appeal be given. This solution is not without its drawbacks. The importance to the parties of an appeal is often wholly incommensurate with the pecuniary sum that is in controversy, while the gravity of the legal question involved bears no relation to such sum at all. The opinion of the profession does not seem to favour the plan of making the right of appeal dependent on the leave of the judges whose decision it is desired to impugn. Such a rule of practice always leaves the suitor dissatisfied. On the other hand, to impose on the Court of Appeal the duty of determining whether leave to appeal should be granted is really to require them half to hear a case in order to decide whether they should wholly hear it. Moreover, it is exceedingly difficult for an appellate tribunal to refuse leave to appeal, if the point of law involved is open on the first blush of it to any doubt at all.

The alternative scheme which many lawyers prefer is to endeavour, while frankly acknowledging that the new system does and must encourage appeals, to destroy as far as can be all double appeals, or in other words to transfer bodily to the Court of Appeal some substantial portion of the work done at present in the Courts in Banc. We have already pointed out the impossibility at this particular moment of directing immediately to the Appeal Court any large additional business, and will not again recur to it. To create a third division of the Appeal Court by adding three more Lords Justices to the present number would be an experiment to be adopted only in the last resort. The plan of prohibiting interlocutory appeals, and allowing final appeals only to penetrate to the Appeal Court, which some have suggested, does not recognize sufficiently the fact that the Interlocutory Paper in Chancery includes matters of the utmost moment, and that even in the Queen's Bench the new trial paper falls into the Interlocutory list. Upon the other hand, to withdraw from the Appeal Court appeals on matters of practice only, would be to withdraw from it a very slight amount of business, for the appeals on points of pure practice are becoming every day fewer and fewer. The conclusion towards which the preceding observations tend, is that the Appeal business will probably for the present have to be left much in its present condition, and that we must trust to time to show whether the relief of the Lords Justices from circuit will not before long bring the present Appeal arrears within control.

The constitution of the Court of Appeal itself is a matter destined probably before a very remote future to present grave matter for consideration. Divisional Appeal Courts of three, placed at the head of the Common Law and of the Chancery business of the country, depend for their success upon their *personnel*. The expense of appeals to the House of Lords is so large and the delay involved so substantial, that practically the Court of Appeal may be said to decide the law in all but an unimportant percentage of the matters submitted to its judgment. In the earlier days of the institution its temporary success was assured by the exceptional genius and learning of the men who in the first few years took their seats on its benches. Lord Justice James, Lord Justice Mellish, Lord Bramwell, and the late Master of the Rolls are figures that must necessarily be missed from any judicial body to which they once belonged, and the Exchequer Chamber—itself a court of illustrious traditions—if replaced by a court of three, was replaced by a tribunal composed partially, at least, of giants. The changes which must be anticipated in the natural order of events in a body that is, what I have called it, a pivot of the new order of things, may sooner or later weaken its hold on the confidence of the profession. Originally the Court of Appeal was intended perhaps to sit in one single division—the exigencies of business have substituted two divisions of three in place of the larger number first designed. And it is not beyond the range of possibility that it may be found expedient to increase the strength of the court, not in order to create a third division in addition to the two at present in existence, but rather to bring to bear upon the appellate business of the country as great a weight of wisdom and experience as can be collected. Whether in the long run inseparable political objections will be found to prevail against the simple and effectual plan of constituting one great and final Court of Appeal for English business—the Law Lords for that purpose serving amongst the Lords Justices in the Supreme Court—while Scotch and Irish appeals might still continue to be dealt with by the House of Lords—is a subject too large and perhaps too controversial to be here discussed within the narrow limits of this paper. But amongst all the questions of moment raised by the Judicature Acts, there is none that deserves more attention than the composition of the Court of Appeal. The brilliant success of the experiment at the outset ought not to lead us to forget to what exceptional causes that success was due, or in a system that gravitates towards appeals, to underrate the importance of the question how the composition of the court that has to deal with the appeals can be permanently arranged on the best and most lasting foundation.

CHARLES BOWEN.

ON THE TRANSFER OF LAND.

THE transfer of land would be simple and inexpensive, if one could at any moment determine who was the owner of it, by which I mean, who was the person or persons who could sell, mortgage, or let it. The question who will become entitled to it on the happening of some future event, as on the death of the tenant for life, though interesting to the parties concerned, is generally speaking of no interest to a purchaser. I purpose in this paper to sketch out a plan for enabling an intending purchaser, mortgagee, or lessee to ascertain, by mere inspection of the books kept at an office, who is the owner of the land. The propriety of making changes in the law itself, as distinguished from changes in procedure, does not fall within the task that I have proposed to myself.

It is, I believe, impossible to invent any improvement in a technical process, unless one understands the process that one wishes to improve. The process of transferring the ownership of land affords no exception to this proposition: and therefore, although many of my readers are conversant with the existing method of transferring land, I shall give a short account of it before I make any suggestions for its improvement. It will be, however, convenient before doing so to point out some differences between land and other property, which necessarily give rise to differences in the manner of transfer.

The purchaser of land wishes to obtain a specific part of the earth's surface, while the purchaser of a railway debenture does not care what particular debenture he receives: all that he cares for is to acquire a debenture of the amount and of the series that he has bargained for: in other words the purchaser of land wishes to acquire a particular thing, while the purchaser of a debenture wishes to acquire a member (he does not care which) of a particular class of things.

There can be no doubt as to the boundaries of a specific chattel. A picture or a horse can be distinguished from all other things; they do not melt insensibly into other pictures or horses, while on the other hand, with some few exceptions, land has no natural and definite boundaries; one may walk from an estate belonging to one man on to the estate belonging to another man without becoming aware of the fact from any physical difference in the

land. It follows that the purchaser of land must ascertain, by evidence, that the boundaries of the land conveyed to him are the same as those of the land that he intends to purchase: and even if he be satisfied that this is the case, he cannot be certain that the existing boundaries are the same as they were even a few years ago, owing to the changes that are constantly taking place by the moving and straightening of boundary fences.

It should be perhaps observed that this difficulty exists even if the description is aided by a map. I know of a case where the owner of two adjacent properties let them to different tenants. The boundaries of the properties as let were correctly delineated on the 25-inch ordnance map. Afterwards the owner sold one property with one yard in width of the other property along the common boundary, and by arrangement with the tenant of the unsold property the fence was moved to the new boundary. To the eye the map remained correct, and nothing but the most careful measurement would shew that it no longer represents the true boundaries of the properties.

Again, when a specific chattel has once acquired a name, that name always denotes the same chattel, notwithstanding the changes that lapse of time may produce in it. The San Sisto means the same picture that it meant many years ago, notwithstanding that it may have been injured by decay or by the work of the restorer. The horse Gladiateur is the same horse as won the Derby many years ago, though he is now in extreme old age. But the same name does not always denote the same land: the owner of Brosley Farm may sell a field off, or throw an adjacent field into it, and in all probability the farm as altered will still be called Brosley Farm, so that we cannot be certain that by Brosley Farm is meant the same land as was meant by it even a few years ago.

These considerations shew that when we investigate the title to land, we have to require evidence of the identity of the land in question with that to which title is shewn. We must not assume that because the name remains the same the land remains the same.

Generally speaking, the person in possession of a personal chattel is the owner of it, and can therefore sell it and give receipts for the purchase money; but this is not universally the case, and unless a purchaser buys in market overt, he may be called upon, after he has paid his purchase money and taken possession of the chattel, to give it up to the true owner.

No person can be in physical possession of property that has merely a notional existence, such as consols, shares in a company, or a chose in action. By a common figure of speech we

speak of the person in whose name the consols or shares stand as being in possession, and sometimes we speak of the person who possesses the instrument by which a chose in action was created as being in possession of the chose in action itself. In the case of property of either of these natures, we are obliged to seek evidence as to ownership other than that of possession. By Statute the entry in the books of the Bank of England, or the register of shareholders is the only evidence admissible in the case of consols or shares. But the evidence who is owner of a chose in action is often one of considerable complexity; it depends upon the history of the dealings with the chose in action since its first creation.

Land partakes of the nature of a specific chattel and of a chose in action. A man can be in possession of it, and we know that the fact of his so being in possession is evidence that he has some interest in it. Possession is *primâ facie* evidence of seisin in fee. But the person in physical possession is rarely the freeholder, he may be a tenant, or a squatter; we have therefore to adduce further evidence for the purpose of ascertaining what are the interests of the persons who collectively are the owners of the land. It will be observed that as the estates or interests possible to be held in land have only a notional existence, the evidence as to what they are is necessarily of a nature similar to that in the case of a chose in action: it is partly documentary, as estates in land can, as a general rule, be created only by an instrument in writing; it is partly parol, for the estates may have arisen owing to the death of one person or the birth or marriage of another.

The practical result is that an intending purchaser or mortgagee of land has to make two investigations of different natures. *First*, he has to ascertain who is in possession, and enquire from him what is the nature of the interest that he claims, and if he says that he is only a tenant at a rent, to enquire to whom the rent is paid, as the latter person has necessarily some interest in the land: *secondly*, he has to investigate a statement made to him by the intending vendor or mortgagor, shewing the nature of the interest proposed to be sold or mortgaged, and to see that this statement is supported by proper evidence; this process is called investigating the title. If it turns out that the result of the investigation is to shew that the vendor has the interest that he purports to sell, the purchaser can take a conveyance from him subject to the interest of the person in possession.

As no prudent person ever purchases or lends money on the mortgage of land without going himself or sending an agent to see it, the necessity of enquiring from the person in possession

what is the nature of his interest in the land causes neither delay nor expense, but on the other hand the investigation of the title is often a tedious and costly process; tedious, owing to the difficulty in obtaining proof of facts material to the title; costly, owing to the necessity of employing highly skilled labour. The vendor's solicitor has to prepare an abstract and the contract or conditions of sale, and in matters of importance the abstract and contract or condition have to be laid before counsel. No prudent purchaser will execute the contract or purchase at an auction under conditions restraining him from having a good title or from calling for the usual evidence in support of it, without taking the advice of his solicitor as to the meaning of the contract or conditions. After the execution of the contract the abstract is delivered to the purchaser, this has to be perused by his solicitor and counsel, requisitions have to be prepared by them and sent to the vendor, and the vendor has to reply to the requisitions and verify his abstract. It often happens that additional requisitions have to be made on matters arising on the answers to the original requisitions, these require fresh answers, and sometimes the process is repeated over and over again.

The title as shewn by the abstract is, as above pointed out, subject to the rights of the persons in actual possession of the land. As a general rule, the abstract does not shew whether any and what easements or *profits à prendre* are annexed in enjoyment to, or are enjoyed over, the land. I say, as a general rule, because it sometimes happens that rights of either of these natures are created by express grant, and in this case the grant ought to be found among the title-deeds of the dominant tenement, though it sometimes happens that a duplicate of the grant is found among the title-deeds of the servient tenement. The investigation of the title generally shews whether the owner of the land sold is entitled to the benefit of covenants restricting the user of, or prescribing a special method of using the neighbouring land, but it does not always, though it may, shew whether it is subject to covenants of such a nature for the benefit of adjoining land, and it never shews whether the public are entitled to any and what rights over it, such as the use of a footpath. It follows that in all cases merely investigating the title is insufficient; enquiry must be made on the spot, not only what are the interests of the persons in possession, but what are the rights, if any, enjoyed by the owners of neighbouring lands or the public, and whether on the completion of the purchase the purchaser will become entitled to any and what rights over the neighbouring lands.

It rarely happens that a man can produce documentary evidence

of his title to property when the bulk of it has become vested in some other person by the effect of the Statutes of Limitations, but it often happens that the title to small pieces of land, added to or taken from a larger piece, depends entirely on those Statutes. This may occur in two different manners: *first* [1], the owners of two adjoining properties may concur in adjusting their boundaries by straightening fences without going to the expense of mutual conveyances, or one owner may encroach on his neighbour's property; *secondly*, the owner of an estate, part of which is settled and part unsettled, may throw a field belonging to the settled part into a farm which belongs to him in fee, and may then devise the farm by a general description; it often happens that neither the person who becomes entitled to the settled estate on the death of the tenant for life, nor the devisee, is aware of what has happened, and they may not discover it till after the expiration of the statutory period.

The expense of the preparation, approval, and execution of the conveyance depends on the state of the title. If the vendor is seised in fee it is insignificant. I lately settled a conveyance of property where the purchase money exceeded £50,000, which, exclusive of the parcels which were thrown into a schedule, could have been written on one side of a sheet of paper. But on the other hand, if there are many incumbrances, the conveyance may be long and costly, and the expense of the perusal and approval of it on behalf of the incumbrancers may be considerable.

It often happens that shortly after the completion of the purchase, the purchaser desires to borrow money on mortgage of the purchased property; in this case he has to incur the expense of copying the abstract already investigated on his behalf, and of preparing an abstract of the conveyance to him. The whole of the title has again to be investigated on behalf of the mortgagee, and it may even happen, if the purchase has been made under stringent conditions of sale, that the mortgagee may reject the title.

From these considerations it appears that we should save both expense and delay in the transfer of land if we could dispense wholly or partially with the investigation of title, and if we could provide that a conveyance from one person only, that is to say, from the owner alone without the concurrence of his incumbrancers, should be sufficient to bind the interests of all parties, subject only to the rights of the persons in possession. I proceed to point out the manner in which I think that these objects can be effected.

[1] Alterations of boundaries of this nature are more common than can be learnt from books or documents.

For simplicity I shall discuss conveyances by which the fee simple passes, but the considerations that I shall advance apply *mutatis mutandis* to conveyances of leaseholds. I do not attempt to consider whether anything can be done to simplify conveyances of copyholds, as I believe that in a few years that tenure will have been abolished.

Even in a complicated case the result of the investigation of a good title must take the form following: 'A with the concurrence of B can convey, and A, B, and C are entitled to the purchase money in certain proportions, or in other words, can give a receipt for it.' These are the only facts that a purchaser is concerned with. The whole investigation of the title is only of use so far as it proves these facts, so that it is unnecessary for a purchaser who is satisfied that the title was prope ly investigated, and a proper conveyance made on the purchase by his vendor, to repeat the investigation.

I propose that on every change occurring after a prescribed date in the ownership of the fee, whether legal or equitable and whether subject to incumbrances or not, and whether such change arises by deed, will, death, or the happening of any other event, the name of the new owner and the description of the land acquired by him shall be entered on a register, that the process shall be repeated on every subsequent change of ownership, and that the statement on the register shall be conclusive in favour of a purchaser, subject to anything appearing on the title prior to the first entry on the register affecting the land, and subject to the rights of the persons in possession of the land, where 'owner' may mean more than one person, and 'possession' includes 'being in the receipt of the rents and profits.' The effect will be that it will never be necessary to investigate the title subsequent to the first entry on the register, all that will be necessary will be to investigate the title prior to the first entry, and as the limit to the title to be shewn on a sale is, in the absence of special stipulation, forty years, extending backwards from the date of the contract, the title to be investigated will continually become shorter and shorter, till after the lapse of forty years from the first entry on the register no investigation at all will be required. In practice titles shorter than forty are often accepted, so that it will probably become the practice to accept titles that had been registered for a few years without investigating the title prior to registration. This would be more likely to be the case if the first person registered as owner on a sale or mortgage was authorised to deposit in the registry a certificate signed by his solicitor of the result of his investigation of the title.

It will be observed that if this scheme be adopted the initial expense of placing the title on the register will be reduced to a minimum, all that will be required will be to produce the conveyance or other evidence of the change of ownership to the proper officer, and for him to make the proper entry on the register.

Settlements present but little difficulty. Under an ordinary strict settlement no one is owner in fee. Under an ordinary settlement effected by way of trust for sale the trustees are owners in fee, but they cannot deal with the property without the concurrence of the tenant for life. For all ordinary purposes an entry in the case of a strict settlement that 'A is tenant for life, and that B and C are trustees for the purposes of the Settled Land Act' will be sufficient: as such an entry shews who can sell, who can give receipts for the purchase money, and who can grant leases. It will be unnecessary to mention on the register any estates subsequent to that of the tenant for life, as no person entitled in remainder can deal with the land itself until his estate falls into possession. In a subsequent part of this paper I shall discuss the method of registering the owners of reversionary interests in those cases where it is expedient so to do.

In the case of a settlement by way of trust for sale it will be sufficient to enter the trustees as owners, with a note that they can only sell or lease with the consent of A the existing tenant for life.

I consider it unnecessary to incumber the register by stating the existence of powers of charging, as they may never be exercised, and until exercised they do not affect the land. When it is proposed to exercise a power of this nature, the deed creating it will have to be produced to the intending lender, and if the deed bears a reference made by the registrar to the entry of the tenant for life as owner on the register, no difficulty can arise: it will not be necessary for the lender to investigate the title so far as it is covered by the register. When the charge is raised it will be registered on the register of incumbrances, which I shall speak of hereafter.

It will be observed that these proposals as to powers of charging follow the provisions of the Settled Land Act very closely, which again follow the ordinary provisions of a strict settlement not falling within the Act, namely that a mere power to charge does not affect the exercise of the statutory or express power of sale until money has been actually raised under it.

The name of the person entitled to and the amount of any mortgage or charge actually made should be registered in a register

of incumbrances, which should be referred to in the register of owners; and every change in the ownership of an incumbrance should likewise be noted in the register. It will be observed that owing to the statutory power of sale vested in mortgagees by the Conveyancing and Law of Property Act, 1881, s. 19, not only the registered owner of the land but also every person registered as an incumbrancer will have power to sell the land[1].

Bearing in mind that either the person making or the person taking under a voluntary conveyance can sell or mortgage the land comprised in it without the concurrence of the other of them, it appears that the proper place to register a voluntary conveyance will be in the register of incumbrancers, leaving the person making the conveyance as registered owner of the land.

As already pointed out, rights, such as easements, *profits à prendre* or covenants, the burden of which runs with the land, may be enjoyed by strangers, and do not necessarily appear on the abstract. These differ from incumbrances, inasmuch as the owner of the land cannot get rid of them without the concurrence of the person entitled to exercise them. In cases where rights of this nature appear on the abstract, and in cases where they do not appear on the abstract and it is so agreed between the parties to the conveyance, they ought to be registered, not in the register of incumbrances which only includes charges that can be paid off, but in a separate register, 'the register of adverse rights,' to be referred to in the register of owners: every conveyance by the registered owner will be subject to the rights mentioned in this register. Any leases which have to be registered (see *post*, p. 28) will be mentioned in the register of adverse rights.

The registers, in a somewhat complicated case, will take the form following:—

REGISTER OF OWNERS.

Owner.	Parcels.	Reference to Register of Incumbrances and Adverse Rights.
A, tenant for life, and B and C trustees, with power of Sale under an Indenture, &c.	*To be described with references to the Land Index.*	Reference to be inserted.

[1] It would probably be convenient to enable the registered owner of an incumbrance to convey all the securities for it.

REGISTER OF INCUMBRANCES.

Owner of Charge.	Principal Sums charged.	Annuities charged.	Parcels.	How Charge created.
L & M.	£10,000.		The whole of the registered land.	Secured by a term of 2000 yrs. under the will of G deceased.
N.		£300.	*Description to be inserted.*	Pin money under an Indenture, &c.
O & P.	£20,000.		The whole of the registered land.	Indenture dated, &c.
Q.	£5000.		On the life interest of A, under an Indenture, &c.	Indenture dated, &c.
R.		£200.	Ditto.	Indenture dated, &c.

REGISTER OF ADVERSE RIGHTS.

The owner of Blackacre has a right of way for all purposes over the road marked ~~~~~ on the plan annexed to an Indenture of, &c.

The whole of the land is subject to the burden of covenants contained in an Indenture of, &c.

An Indenture of Lease, &c., comprising *parcels.*

The effect of a man's being registered as owner should be to enable him to make a valid conveyance of the fee simple to enable him, or the other persons registered for that purpose, and the registered incumbrances, if any, to give a receipt for the purchase money; subject, however, to anything appearing on the title prior to the original registration, subject to the rights of the persons in possession of the land, to the rights of the owners of neighbouring lands, whether registered in the register of adverse rights or not, and to the rights of the public: in other words, it should be the same as if the registered owner, his trustees and incumbrancers, if any, had shewn a good title to the fee simple under the existing practice.

The present necessity for obtaining the concurrence of incumbrancers in a conveyance causes, as before pointed out, both expense and delay, owing to the necessity of having the conveyance perused on behalf of and executed by them. I propose to obviate this by enacting that a conveyance by the registered owner alone shall pass the legal interest, subject to the rights of the incumbrancers, and that it shall be at the option of the vendor to obtain the concurrence of the incumbrancers or to direct the purchaser to pay the purchase money into the land office, whose receipt shall be sufficient,

and that on such payment being made the purchaser shall be entitled to the land free from the incumbrances. It will be the duty of the office to divide the money between the persons entitled thereto, leaving them in case of dispute to apply to the Chancery Division.

It may be objected that possibly the purchase money might not be enough to satisfy the claims of the incumbrancers, and that it would be a hardship on them to have the land sold over their heads for a sum which would be insufficient to pay them. Various plans might be adopted to obviate this difficulty; but it will probably suffice if the payment into the office is a discharge only in cases where the purchase money amounts at least to the total principal sums due, and a year's interest thereon, and to the capitalised value of annuities.

It will I believe be found convenient, for many years at least, not to insist on the employment of any special form of description of the parcels in the conveyance or the register, but to allow the parties to use any form that they think proper. In particular I consider it most inexpedient to insist upon a map being annexed to the conveyance, for although a map is invaluable as part of the description of the parcels, it must be remembered that an inaccurate map is worse than useless, that the preparation of an accurate map is sometimes expensive, and that even in cases where expense is not an object the preparation of a map may cause delay; add to which that a map never forms part of a will, and that cases occur where the parcels in a deed are expressed by a general description only, as 'all my estates in the county of Kent,' and where the employment of a map would be barely possible.

As above pointed out, the boundaries of land are often altered, and therefore it will be desirable, as a general rule, that registration shall not be conclusive as to boundaries. But any registered owner should be at liberty, after giving notice to his neighbours, to have his boundaries determined by an officer of the land office, and to have the result registered: it must, however, be remembered that such a determination will be of use but for a short time, as the boundaries may be changed immediately after they have been determined. It would be a great improvement in the law to allow all owners, whether absolute or limited, to adjust their boundaries with their neighbours without the necessity of making an exchange, and in small cases without the formality of a deed, and to allow the fact of a fence or boundary mark having been made and not removed to be conclusive evidence as to the boundary after a few years.

The question how far a purchaser or mortgagee should be bound by notice of an incumbrance not appearing on the register, and not being merely a right gained by possession, is one of considerable

difficulty: on the one hand it is argued that if he is to be affected by notice of such an incumbrance you do away with the benefit of the register, and that on the other hand if you enact that he is not to be affected by notice, you are enabling him to act in a dishonest manner. What can be more immoral than to enact that a purchaser shall be bound to pay to A money that he knows to belong to B, and that even if B has told him not to pay to A?

The cases of a purchaser and of an intending mortgagee appear to differ. If a purchaser pays his money to the wrong person, the true owner runs the risk of its being lost, and therefore it might be provided that a purchaser, having notice of a non-registered incumbrance, should pay the purchase money into the Land Office, so as to give an opportunity to the true owner of the purchase money of recovering it; such a provision would present no impediment to sale.

The case of a mortgagee appears to be different. Having regard to the great amount of litigation that takes place between mortgagees as to priority depending on questions as to notice, it appears on the whole to be advantageous to say that no incumbrancer shall be affected by notice of a non-registered incumbrance: it may be observed that such an enactment will not necessarily make an intended mortgagee act dishonestly, for no one is bound to lend money on mortgage, and the probability is that on an intending mortgagee receiving notice of a non-registered incumbrance he will call on the mortgagor to discharge it, and on his failing to do so will decline to proceed with the mortgage; on the other hand the effect of the proposed provision will be to render it unnecessary for a mortgagee to preserve evidence of what took place at the time when his money was advanced, for the purpose of shewing that he had no notice of an unregistered incumbrance.

In connection with the question that we have just discussed, it appears convenient to consider what ought to be the effect of a conveyance not produced for registration. *First*, it may be made absolutely void; this, though it will facilitate the actual work of the registry office, will impose a most severe penalty on a mere blunder, it will also open the door to fraud. *Secondly*, it may be made to operate in equity only, I think that the effect of such a provision will be to raise up a practice similar to that now holding in the case of copyholds, where we have one set of assurances dealing with the legal interest and another dealing with the equitable interest: any scheme which tends to separate the legal and equitable interests must evidently give rise to two sets of assurances, and thus cause expense. *Thirdly*, it may be declared to be good as between the parties and void as against any subsequent conveyance or change of ownership that was registered. In other words, assur-

ances and changes of ownership should have priority according to their order of registration. I am inclined to think that the latter will be found to be the most convenient plan in practice. No doubt some few cases may occur in which a purchaser or mortgagee will be willing to trust to the honour of his vendor or mortgagor and omit to register, but they will be rare, as the original owner will be able to deal with the property. And if the provisions as to notice that I have suggested are adopted, though the original purchaser may be able to get hold of the purchase money on a sale by the original owner, he will be postponed to all registered mortgages made by him. It is hardly likely therefore that any person will wilfully abstain from registration.

It will be proper to declare that if on the registration of any assurance some of the parcels are omitted to be registered, the effect as to those parcels should be the same as if the assurance itself had not been produced for registration.

Let us now consider what will be the effect of an error in the register as to the parcels: there are two cases, either some of the parcels may be omitted, which as above stated will produce the same effect as to them as if the deed conveying them were not produced for registration, or some parcels may be inserted in the register by mistake.

First, let us take the case of omission. Here, if the land is already on the register, the original owner can sell or mortgage as being the registered owner, but if the conveyance imperfectly registered is on a sale, the purchaser on that sale will be in possession, and a purchaser or mortgagee from the original owner will take subject to the rights of the original purchaser as being in possession; on the other hand, if the conveyance imperfectly registered is a mortgage this will not be the case, and a conveyance from the original owner will have priority over the conveyance imperfectly registered. The original purchaser can neither sell or mortgage, as the land is registered as belonging to another person. If the omission of the parcels was at the time of the original registration, the effect of a registered conveyance by the original owner will be the same as in the former case, but as the conveyance to the original purchaser is good as between him and the original owner, and as no person is registered as owner he also can sell or mortgage, and a purchaser or mortgagee from him will, if registered in time, obtain priority over any person claiming under the original owner.

Secondly, let us consider the case of parcels inserted in the register by mistake: here the purchaser or mortgagee will always find the rightful owner in possession, and any conveyance by the person who is wrongfully registered as owner or mortgagee,

will be subject to the rights of the true owner as being in possession: and this appears to be the case whether the parcels erroneously inserted belonged to the original vendor or to a stranger; the true owner will be unable to convey, as another person is registered as owner.

Provisions will have to be made enabling the registrar, with the consent of all parties, and of the Chancery Division, in case of dispute, to rectify the register.

I shall presently describe a method of making an index of all the land which is registered, which, if carefully carried out, will render it impossible to register by mistake any land not belonging to the parties to the conveyance, except on the original registration of the land.

Under the proposed scheme, the fact of a man's being registered as owner is conclusive: some plan therefore must be devised for the purpose of preventing any person from fraudulently personating the registered owner and making a conveyance, for on such conveyance being made, and the purchaser under it being registered, he will become the owner, and the original owner will only retain his rights as being in possession. Under the present system, where the burden is thrown on the purchaser of ascertaining that the person who says that he is the owner, is the person who shews a good title, fraudulent personation is, I believe, very rare. It generally happens that the person who can convey the legal estate has possession of the deeds, and a prudent purchaser who finds that his vendor is not in possession of them makes enquiry as to the reason of this being the case; also the vendor is generally described in the title-deeds, so that a purchaser can make enquiries at the address given in the deeds in cases of suspicion, and it is the practice where a vendor is described as being of one place in the title-deeds, and is found not to be of that place at the time of sale, to require evidence of identity.

Under the proposed scheme the safeguard due to the possession of the deeds will be lost, and we must adopt some other method of preventing personation. I propose to adopt a plan similar to that adopted by the Bank of England in the case of transfers of Government Stock. When an application is made to the Bank to make a transfer, they send a letter by Post to the address found in the books of the Bank of the owner of the Stock, so as to give him an opportunity of stopping the transfer, he need not reply to the letter unless the application is unauthorised by him. I propose that every registered owner shall have an address for service registered at the Land Office, and that no transfer shall be made until a registered letter has been sent to such address and no answer has been received for a prescribed period.

It may be objected that this plan will cause delay. A matter which may, especially in the case of mortgages, be of importance. Two answers may be given to this objection. *First*, that a similar plan is not found to be inconvenient in the case of Stock, and *secondly*, it may be provided that a transfer of mortgage may receive provisional registration without waiting for the expiration of the prescribed period, such registration to be of no effect if during that period the registered owner objects, but to become absolute at the expiration of the period if no objection is made.

The register ought to be kept in such a manner as to give at any time an immediate answer to both the following questions. *First*, what land belongs to A, and *secondly*, to whom does a particular piece of land belong.

The first object can be attained by keeping an alphabetical index of owners. Nothing but experience can shew whether it is most convenient to place all the owners in one index, or to arrange them under the counties or parishes where their land is held.

The question how to discover who is the owner of a piece of land on the register is one of considerable importance, and is not without difficulty. Possibly the most convenient method of effecting this will be to turn the ordnance maps into an index. As above stated, I propose to allow the parties to use any description of the parcels that they think fit, but I should require them to identify such of the parcels as are susceptible of physical delineation with the corresponding parts of the 25-inch ordnance maps, or other accurate maps to be kept at the office; the parcels should be distinguished on the office maps with a number and colour to be referred to in the description contained in the register. It should, as before suggested, be declared that the boundaries, as marked on the map, are not to be conclusive. A purchaser of land not already placed on the register should be at liberty to look at the office maps for the purpose of seeing that the land that he is going to purchase is not already on the register, and a purchaser of land stated to be already on the register should be at liberty to inspect the maps for the purpose of seeing whether the reference from the map of the land that he had purchased is the reference to the land belonging to his vendor. It would be proper to declare that the purchaser of all land, whether already on the register or not, should be at liberty to inspect the registers of adjacent property, not for the purpose of ascertaining who is the owner, but for the purpose only of seeing that the boundaries corresponded with those of the land which he has purchased.

The register of parcels should contain a reference to the maps

used as indices, probably the best form of reference would be by number and colour to a sheet of the map to be denoted by an office number. In country places where the properties are large, and where consequently there are but few owners of the land comprised in each sheet of the map, a reference to the sheet only will suffice. But if either at the time of the original registration, or subsequently, the land delineated on one sheet becomes divided among many owners, it might be found convenient to subdivide each sheet into vertical and horizontal columns denoted by figures, and to make a reference from the register to the square where the land was situated; the numbers may conveniently be written in the form of a fraction, the numerator denoting the vertical, and the denominator denoting the horizontal column, where the land is situated. The reference in the register to the map may take the following form, '50, $\frac{2}{3}+\frac{4}{5}$, blue 13,' which would denote the piece of land distinguished by a blue colour, and the number 13 at the intersections of the vertical columns 2 and 4 with the horizontal columns 3 and 5 on the sheet of the map denoted by the office number 50.

It may be objected that if the parties are to be at liberty to describe the property in any manner that they think fit, they may describe it by a general description in the conveyance, and only enter part of it in the maps kept at the office. In order to prevent this, it would be necessary to declare not only that every conveyance that ought to be registered should, if not registered, be void against a registered conveyance, but also that a registered conveyance should, as against a subsequently registered conveyance, be void as to any parcels not entered on the office map. The delay that would be occasioned in the identification of parcels described by a general name with those of the map, might be obviated by allowing a prescribed time for entering the parcels on the office map, and by declaring that the entry when made should relate back to the date of registration of the conveyance.

When land already registered is dealt with, various states of facts may occur. *First*, the whole of the land may be dealt with, this will render no change in the map necessary: *secondly*, part of it only may be dealt with, this will render it necessary to alter the map and make new references to it and from it. Sometimes the new reference may be made by altering the existing map by hatching or dotted lines, but if there are many new references it will probably be necessary to colour a new map; no confusion will occur, as the map already in use could have a reference made on it to the office number of the new map. It may even

be necessary to retain both maps in use, for where land subject to an incumbrance is sold in plots, the purchaser taking an indemnity against the incumbrance, the charge will appear on the register of incumbrances as affecting each plot, but it would be proper still to retain the reference to the original map.

Many other cases may be suggested where the scheme of using the ordnance maps as an index will produce difficulty, but in my opinion methods would be devised of obviating them after a short trial of the scheme.

It may be objected that where the parcels are described by a general description only, the Registrar will be at the mercy of the parties, he will have to fill up the map in the manner that they tell him. It would probably be sufficient to require in such cases a statutory declaration as to identity. Even if an error occurred in the map, no very serious calamity would occur, as has already been seen, when we considered the effect of an error on the register.

It may be found that the necessity of making a land index in the manner just described causes expense and delay. If this should on trial be found to be the case, an index can be made in the manner following. Instead of delineating the parcels on the map, make a reference from the map to the register of each owner of the land comprised in it. If this be done, an intending purchaser of land not already on the register will have to inspect the parcels registered in the name of the owner of every piece of land described in the map which contains the land that he intends to purchase, for the purpose of seeing that the land is not already on the register, but if the land that he wishes to purchase is already registered, it will be necessary only to look at the parcels registered in the name of his vendor. Though this plan will not be as effective as that already described, it will probably answer in country places where there are but few owners of the land comprised in any one map.

Incorporeal hereditaments are not susceptible of delineation, no plan therefore of indexing them by means of a map appears possible. Instead therefore of indexing them by means of maps, I propose to index them by their names, arranged alphabetically according to counties, under subheadings of 'manor,' 'market,' and the like.

Reversionary interests require special treatment, for although the owner of such an interest is not the owner of the land, he is not the person who can sell, mortgage, or let it, reversions are constantly dealt with, consequently it appears desirable to adopt some method of registering the owners of them.

It will be observed that according to the scheme proposed, only the owner of an immediate interest will be registered, no notice

will be taken of a reversionary interest; if and when it falls into possession, the then owner of it will be registered as owner of the land. However complicated the dealings with the reversion may be, the effect of them when it falls into possession must be that A is owner subject to certain incumbrances vested in B and C, and that is all that has to be registered, so that when the reversion has fallen into possession, and the registration has been completed, the intermediate dealings become useless for the purpose of the registry.

The owner of a reversion in land, not on the registry, is rarely able to describe the parcels except in a very general manner, for he rarely has access to the deeds; therefore it is impossible for him in this case to make any entry of the dealings with the reversion that would shew what lands he deals with; he can on the other hand register the effect of his dealings over whatever his reversion may consist of. When all the land to the reversion of which he is entitled is on the register, the case is different, as he can ascertain the parcels from the register.

I propose therefore to have a separate registry of dealings with reversions. In cases where the land is already on the register it will be convenient to make a reference from the land register to the register of reversions. No land index will be necessary, as the reversioner is not the person who can deal with the land itself. An index should be kept of the names of the reversioners who have dealt with their properties, referring to the register of reversions, then when the reversion falls into possession it will readily be ascertained from the register of reversions who is entitled to be entered on the register as owner of the land.

There appears to be no necessity for registering ordinary leases for twenty-one years; the leaseholder is generally in possession, so that his interest is sufficiently protected against the registered owner, and, owing to the short duration of the term, it is but rarely that any complication occurs in the title.

In the case of leases for long terms it appears proper to protect the leaseholder against the claims of the registered owner by registering the lease in the register of adverse rights. The title to a lease of this nature generally becomes, long before the end of the term, as complicated as the title to the fee. It will therefore be proper to have a separate register of the owners of leaseholds, with registers of incumbrances and adverse rights of a nature similar to those suggested in the case of freeholds.

It will save much expense and delay if it is enacted that no statutory charge against a registered owner, such as a judgment, crown debt, or *lis pendens*, shall affect any land on the register

until it is entered on the register of incumbrances of the land: it may further be provided that a statutory charge once entered on the register shall remain in force until satisfaction is entered up without the necessity of any re-registration.

We have now to consider the effect of a change of ownership made otherwise than by a conveyance *inter vivos* to which the registered owner is a party. This may take place (1) on the death of the registered owner, (2) on the determination of his estate by an executory limitation, (3) by a deed-poll executed by the promoters of an undertaking under the Lands Clauses Act, 1845, (4) by bankruptcy, (5) by a judgment of a court of competent jurisdiction.

On the death of the owner of land, or on the determination of his estate by an executory limitation, the person who becomes entitled has a right to enter into possession of the land. Under the present system no judicial investigation is made into his title: if the wrong person enters, the rightful owner is put to his ejectment: the person wrongfully entering can rarely sell or mortgage the property, as he cannot shew a good title. Under the proposed scheme if a man enters into possession and is registered as owner, he can deal with the land as against all the world, and if the rightful owner brings an ejectment he will not be able to recover against a purchaser from, or mortgagee of, the person wrongfully entering, the conveyance or mortgage by whom it is registered before the registry of the action of ejectment as a *lis pendens*. It will therefore be proper to require strict evidence that a person, who on the death, or other determination of the estate, of the registered owner claims to be registered, bears the character which entitles him to be registered, that the event has happened which causes his estate to vest in possession, and what is the land to which he becomes entitled. All these facts may be proved in the manner in which they are now proved according to the practice of conveyancers, namely, by statutory declaration, supplemented where possible by certificates: but it will probably be proper in each case to cause notice of the application to be served on some person who has, or represents the person who has, an interest to dispute the facts; thus an application for registry by a devisee should be served on the heir-at-law, the application by a remainder man on the trustees of the settlement and the next in remainder man.

The question what parcels pass under a devise is often a matter of some nicety, owing to the devises being expressed in general terms as 'Brosley farm,' 'my estates in the county of Kent.' In all these cases the meaning in which the testor used the words can only be determined by extrinsic evidence; I propose that where there is no dispute as to the facts the evidence shall be a statutory

declaration similar to the usual declaration of identity required by conveyancers, and that in case of dispute the evidence shall be taken in chambers in the Chancery Division. As above pointed out, there is some risk of confusion between land of which the testator is tenant for life and that of which he is seised in fee, a risk which will be reduced to a minimum when all the land in the country has been placed on the register. It should however be remembered that where at the death of an owner in fee or tenant for life his land is not on the register, the change of ownership arising on his death will have to be registered, so that in cases where part of the land is in settlement the remainder man will be on the alert, and it is probable that few mistakes will occur if notice of the application for registration by an heir-at-law or devisee is required to be served on the trustees of every settlement of which the testator is tenant for life.

If the law is altered so as to make lands of which a testator or intestate is seised in fee vest in his personal representatives in the same manner as personalty, the investigation will be much simpler. The personal representatives will on a man's death be entitled, on production of the probate or letters of administration, to be registered as owners of all the lands of which he died seised in fee, so that if his lands are already on the register no investigation will be necessary; if they are not, the lands must be registered in the names of the personal representatives in the manner above pointed out, as on an original investigation, in the latter case some enquiry will have to be made as to what the lands are.

Where the promoters of an undertaking take land by means of a deed-poll pursuant to the L. C. C. Act, 1845, it will be necessary to prove to the registrar those facts which enable the land to be taken.

I propose that an adjudication in bankruptcy shall not oust the powers of a registered owner until it has been entered up in the register. The nature of the entry will depend upon whether the bankrupt is seised in fee or for life only; in the former case the trustee in bankruptcy will be entitled to be registered as owner in his place, in the latter case the bankruptcy will have to be entered in the register of incumbrances affecting the life estate. No delay will be occasioned by requiring the adjudication in bankruptcy to be registered as against the land, for the person obtaining the order will produce it to the registrar, who will forthwith make the necessary alterations in the register.

Where the ownership of land is changed by the judgment of a court the production of the judgment will be sufficient to authorise the registrar to make the necessary alterations in the register as to the land affected thereby.

Although the broad principles of the proposed scheme can be settled once for all, and can therefore safely be embodied in an Act of Parliament, it is obvious that nothing but trial will shew whether the details of this or any other scheme work correctly, they will probably require constant alteration. It will therefore be desirable to insert the details into rules capable of being altered by a proper authority without the necessity of applying to Parliament. I also think that it is desirable to make the Land Registry Office a Government Department, so that a minister of the Crown may be directly responsible to Parliament for it being properly and expeditiously worked. No one is responsible to Parliament for the delay which occasionally occurs in the chambers of the Chancery Division. The officials at chambers are at times overwhelmed with work, which consequently falls into arrear, it is in vain that the unlucky suitors ask for a larger staff of officials, the Treasury naturally declines to spend more money than it can possibly help, and unless the Land Registry Office is directly represented in Parliament the same state of things is likely to occur in it: add to which, that a minister responsible for the proper working of the office is likely to cause the rules to be revised as often as occasion requires.

The Office will have to be assisted by a proper legal staff. Probably it will be convenient to appoint a few salaried conveyancers to assist the registrar, with power to the parties interested to insist on any particular question being laid before counsel, or if necessary before a judge of the Chancery Division at chambers. In most cases the construction of a deed presents but little difficulty, but in some few cases the construction of deeds and in many cases the construction of a will cannot be arrived at without the assistance of a counsel who is accustomed to advise in hostile cases, or even without the decision of a judge.

If the proposed scheme is carried out there appears to be no need for insisting on the transfer of land or of a charge being made by deed: a simple authority to the registrar under the hand of the registered owner ought to be sufficient to authorise him to make the necessary changes in the register; but even if a provision of this nature is made, deeds will probably be used for time to come for the purpose of obtaining the statutory covenants for title. It will be observed, however, that these covenants will gradually become of but little importance, as they can only operate in cases where the title prior to registration is imperfect.

Lastly, if the proposed scheme is carried into effect and is found to work so well in practice that a sale or mortgage can be safely made without legal advice, so that the only legal expenses are the

office fees, there will remain a very heavy expense attending the transfer of land, which, so far as I am aware, has not been mentioned in print, I mean the expense of valuation. In many cases, even under the existing practice, the valuer's bill greatly exceeds the solicitor's bill. I suppose that the greater part of the land in the country is valued at least once in every ten or fifteen years; valuations are generally made on a sale or mortgage, and sometimes on a lease: add to which that a valuation may have to be made on a rating or Income Tax appeal, and if threatened legislation be made it will have to be made on every death. I believe that the expenses attending the transfer and ownership of land would be diminished by having a system of accurate public valuation to a much greater degree than they will by the best possible reform of law and procedure.

HOWARD W. ELPHINSTONE.

A DIFFICULTY IN THE DOCTRINE OF CONSIDERATION.

AS far as I understand, contracts are valid in English law only on one of two grounds, either on account of a certain form observed, or on account of a certain mutuality between the contracting parties. The person who makes a promise to do or not to do something must derive some gain in return for his promise arising from an act or forbearance of the other party (the promisee), and this gain is called *consideration*.

Accordingly a promisor can be sued in virtue of an existing contract only if it is proved by the plaintiff that he is benefited in the way mentioned or implied in the contract. And on the other side the promisee can bring an action with success against the promisor only if he is able to prove that some benefit was granted to the promisor or some loss sustained by himself in return for the promise.

This mutuality of the acts or promises is a necessity. Consideration, it is said, must move from the plaintiff; it is not sufficient if the promisor would be benefited by third persons who are not parties to the contract, in consequence of it. Besides, it is said Consideration must be of some value in the eye of the law, which I take to mean that it must be—ultimately at least—reducible to a money value (conf. Anson, p. 61[1]).

According to Roman law a contract, properly so called, is actionable either (1) in virtue of its form (only the *stipulatio* in modern Roman law); or (2) because some thing has been given by one party under the condition to have it returned either in specie or in genere by the other (*Contractus re*); or (3) because in certain very important cases the mere consensus was considered to be sufficient to create actionable obligations (*Contractus consensu*).

There can be no doubt that among the consensual contracts the *emtio venditio*, that is, when a thing is to be given against the price to be paid by the other party, the *locatio conductio*, when the use of a thing or services are promised by one person in return for a sum of money from the other, the *societas*, when persons promise one to another to contribute to a common purpose, each imply a consideration in the sense before mentioned.

In short, in the case of the essentially bilateral contracts, i. e. those contracts which contain mutual promises of the parties concerned, a consideration is necessarily present.

[1] [We must add that every legal right, whether of apparent practical worth or not, is deemed to be of some value.—Ed.]

And the same must be admitted of most of the *contractus re*, although they are essentially unilateral, involving only the promise to restore the things given or things of the same kind.

Thus it is clear that in case of a *mutuum* only the person who receives the money promises to do something, i. e. to restore as much money or other tangible things to the lender as he has received. But it is equally clear that he is benefited by the contract, as having received money for his own use and disposition. The same remarks apply to the *commodatum*, where an individual thing is given to a person to enable him to make a certain use of the thing by the will of the *commodans*, the borrower being obliged to restore the thing after having made the use of it allowed by the lender.

The creditor (*pignoris*) also derives a benefit by the *datio pignoris*, because in this way he gets security for his claim. Consideration for his promise to restore the thing pledged after he has got satisfaction for his claim is therefore present in this case also.

Quite different, however, is the fourth case of real contracts with which we have yet to deal—the *depositum*. If I leave with a friend a box which I cannot take with me when I am going on a journey, then he is under the obligation to take care of it—he is liable for *dolus* and *culpa lata*, and has to restore the box as soon as I claim it back. It is quite clear that here the person who makes the promise is not at all benefited by the contract; he is merely burdened by it: he has to provide the necessary room for the thing deposited, and is liable for his gross negligence. Consideration in this case seems to be absent. But there is not the slightest doubt that a *depositum* is a valid contract, and perfectly actionable according to English law. For this opinion I find sufficient evidence in the usual text-books[1], as well as in two cases which I have considered a little more carefully: Hart *v.* Miles, 4 C. B., N. S. 37 ad. fin., and Coggs *v.* Bernard, 2 Lord Raymond's Rep. p. 989.

The facts of the case of Hart *v.* Miles are shortly the following: the plaintiff left two bills of exchange in the hands of the defendant, who promised to get the bills discounted and to hand over the proceeds to a certain banker to the plaintiff's account; afterwards the defendant succeeded in getting the bills discounted, but he failed to fulfil the other part of his promise to pay the proceeds to the plaintiff's account.

The Court held that the promise was made upon good con-

[1] Anson, p. 78. The fact of a mere placing or leaving property in the hands of a bailee or depositary will create a promise to use reasonable care in the safe custody of the property and will support a promise to undertake certain services in respect of it.

sideration, namely, the permission of the plaintiff to the defendant's retaining the bills of exchange in his possession.

The fact (so says Byles J.) that the defendant entrusted or continued to entrust the bills to the defendant was a good consideration, moving from the plaintiff, for the defendant's promise to hand over the proceeds, if he succeeded in getting the bills discounted.

But is this really true? Is the fact of leaving things with another person in order to have them or their value preserved for oneself really any advantage to the person charged with this duty, or is he not merely subjected to a burden? I think there can be no doubt whatever that the word permission, grant, or other expression which conveys the idea of a benefit conferred is not applicable to such an act.

And it seems to me that the three judges, although they unanimously justified the promise in this way, felt the weakness of this argument. At least, they give other reasons. Thus they say the loss of the opportunity of having the bills discounted elsewhere was a detriment to the plaintiff, which would be of itself a sufficient consideration.

To this I must answer, that it is quite clear that parting with possession (and its consequences) is in itself a disadvantage, but in the given circumstances, where a man is either obliged or wishes for some reason to part with his possession, it is *an advantage* to have somebody to whom one can entrust the custody of the things to be parted with.

Moreover, the kind of transfer here spoken of has not such a reference to the person of the promisor as seems to be implied by the notion of consideration. There is no benefit conferred by it upon that person as there is, for instance, when a right to sue him is waived by the promisee.

I will now consider the case in question from the point of view of the Roman law.

As I have explained, in English law the case is treated as if it were a *depositum*. It will therefore be useful to consider its facts under the rules which determine the nature of Depositum in Roman law, and see whether it really belongs to that class of contracts.

A Depositum is concluded if a person accepts a thing given to him without any salary for his trouble and without any other obligation than to keep the thing in his custody and to deliver it to the *deponens* at any future time, if he should ask for it (Arndts, § 285). Thus it is decided in D. 16. 3. 1. § 11, that if a man receives a thing under the condition to deliver it into the custody of a third person he is liable to an *actio ex mandato*, and not to an *actio depositi*; and a similar decision is given in the two following

sections of the same title (D. 16. 3. 1. §§ 12, 13). If we apply this principle to the contract in the case of *Hart* v. *Miles*, we see that, according to the views of Roman law, the transaction is not a *depositum* but a *mandatum*, for the defendant who retains the bills is under the special obligation to discount them and to pay the proceeds to the plaintiff's banker.

Thus we are driven to enquire whether there is not something in the nature of a *mandatum* (the fourth consensual contract) which would constitute the elements of consideration in accordance with our definition of this notion. At the first sight I am inclined to negative this question, for a person who undertakes to perform the business of another man upon his request without any reward is apparently burdened, and only burdened, by such an agreement.

But in the same way as in the case of *depositum*, it does not seem as if there were any doubt in the minds of the judges as to the actionability of a *mandatum* in the sense in which it is defined by the Roman jurists.

It will therefore be worth while to state the reasons given by the Courts, and for that object I intend to consider the second case of *Coggs* v. *Bernard*. Here the parties agreed that the defendant should take up several hogsheads of brandy in the plaintiff's cellar, and lay them down safely and securely in a certain cellar in another street. But in putting them down there, one of the casks was staved, and a great quantity of brandy was spilt. The question was whether the defendant was liable to make good this loss.

The judgment is remarkable for its clearness. It distinguishes the case clearly from a *depositum* in the sense of Roman law (a general bailment), and says that in such a case the bailee (depositarius) is liable only for gross negligence. But it is different if a man expressly undertakes such an act as to forward things safely and securely; then he becomes liable if damage is done to them *by his neglect* (in general, whether *culpa lata* or *levis*). This opinion, given by Mr. Justice Gould, is more fully developed by Chief Justice Holt. He distinguishes clearly the different cases of bailment, and determines the liability in each case. Thus the bailee with whom a thing is deposited is liable for gross negligence; the bailee who had undertaken to carry things gratis will be liable if the things were spoilt by his own fault or that of his servants or agents, but not if damage was done by third persons to the things. And then he goes on to say, that such a transaction is called a *mandatum* by Bracton, creating an *actio ex mandato*. In English it is called, as the Chief Justice expresses himself, an acting by commission; and if a man acts by commission for another gratis, and behaves himself negligently in the execution of his commission, he is answerable.

We see then that a *mandatum* is a valid transaction according to these authorities. But where is the consideration which would support its actionability?

The only answer I can find in the judgment is that the owner's trusting the defendant with the goods is a sufficient consideration to burden him with a careful management of the goods.

If we generalise this sentence we must say: The confidence or trust which is put in the *mandatarius* by the *mandans* is a good consideration for the obligation of the former. But I think this confidence will usually be found to be present not only in the case of *mandatum*, but in all other contracts; though its presence is by no means necessary for the validity of a contract. I may give a *mandatum* without trusting a person, simply because there is no other person whom I could employ, whilst there is an urgent necessity for employing some one. Trust is nothing but the usual *motive* why we enter into contractual relations with a certain person, and not with others. It has nothing to do with the notion of consideration, as it is understood in the sense stated above.

According to our researches, therefore, consideration is absent in case of one of the *contractus re*, the *depositum*, and it is equally absent in one of the four *contractus consensu*, the *mandatum*, although both the contracts are actionable, according to English law, and the liability of the *depositarius*, as well as the *mandatarius*, is exactly the same as that which is recognised by Roman law. The *depositarius* is liable for *dolus* and *culpa lata* only, the *mandatarius* for every kind of *culpa*.

It would be very interesting to extend this investigation to some other cases of contract in which difficulties have arisen about consideration, but this I must leave for some other opportunity.

ERWIN GRUEBER.

[Certainly it will not do to say that the bailor's confidence in the bailee is a consideration for the bailee's promise. Mr. O. W. Holmes has pointed out (The Common Law, pp. 196, 197) that the case was really treated as one of delict, by a survival of the theory on which the action of assumpsit was framed. Our modern account of the matter is that parting with the possession of the goods is consideration enough. No doubt the bailor deprives himself of the legal advantages of possession in order to gain a greater benefit. But this is the case in every contract; a man gives a valuable consideration because that which he expects in return is in his own judgment better for him than that which he parts with. In the case of a gratuitous bailment the theory of Consideration is strained to the utmost, but it does not break.—ED.]

THE ADMINISTRATION OF JUSTICE IN CEYLON.

MANY people suppose that Ceylon is under the government of India, and this is hardly surprising. Lying close to the continent of India, and inhabited by native races who migrated originally from India, one would naturally suppose that whatever government might suit India would suit Ceylon also. In fact, the small portions of Ceylon which the Dutch owned and ceded to England in 1796 were at first attached to the Madras Presidency; but an over-hasty interference with existing arrangements, coupled with intolerable rapacity and corruption on the part of imported Malabar officials, caused the Sinhalese on the west coast to revolt, and before the century was out, Mr. Pitt determined that the dependency should thenceforward be governed as a Crown Colony. Hence it is that Ceylon, instead of being governed as part of the great Indian Empire with which she has so much in common, shares the care of the Colonial Office with our West Indian possessions, the Australian Colonies, and other dependencies totally unlike herself. Advantages at once suggest themselves which Ceylon might have enjoyed, had she been allowed to share the government of her grand neighbour, instead of being governed by herself, on a little scale, under another department. In India, Land Settlement, Codes of Substantive Law and Procedure, and many other matters of legislation and government, have been contrived by the high talent at the disposal of a government conducted on a grand scale. Poor Ceylon offers a sorry contrast to all this: much of her legislation embodying substantive law has been very unintelligently framed, and legal procedure halts in a state of confusion between traditions of the Roman-Dutch law and innovations tacitly borrowed from England.

In Ceylon, as in India, England undertakes to govern a large native population very unlike Englishmen in most of their ways, and in each place the European inhabitants must always, for climatic reasons, be in an infinitesimally small minority, compared with the native population. The task of government includes that of providing suitable law and efficient administration of justice. We English are perhaps a little disposed to plume ourselves on the benefits conferred upon Orientals in the shape of British justice.

Our administration of justice is certainly honestly intentioned and, so far as concerns English judicial officers, scrupulously pure. '*Nulli vendemus, nulli negabimus aut differemus rectum aut justitiam.*' If we apply the Magna Charta promise to ourselves as rulers of Ceylon, the first branch of it is kept faithfully. As to the '*nulli negabimus aut differemus*,' I fear we have less cause for self-gratulation. There is no native 'public opinion' in Ceylon, but if we could get at the great mass of private opinions and assess a resultant, I doubt if it would be complimentary, on the point of efficiency, to the administration of justice.

Unfortunately, we are somewhat prone to underrate the importance of this department of Government, and to listen with impatience to suggestions that the administration of justice in an eastern dependency can leave much to be desired. Law is not a popular topic with Englishmen. Ourselves a practical, law-abiding people, we habitually in the main conform ourselves to the law, and litigate as little as possible. The habitually litigious man is rare and deservedly unpopular. We like to hear as little as possible of law and lawyers. The people enjoy incorruptible British justice; what more can they want? And if law in general is an unpopular subject, procedure as distinguished from substantive law is still more so. Some would even seem to regard all procedure as *ex necessitate* mere pettifogging technicality, cunningly devised by lawyers for their own base ends. Perhaps this is a tradition lingering from bye-gone days when litigation in England was hampered by 'valuable forensic inventions' now long since swept away by the besom of law reform.

To ensure justice to the governed we need, beside judicial purity, a body of substantive law adapted to the circumstances of the people, and a well devised system of procedure, by means of which the law may be invoked, enforced and generally brought to bear. Moreover, the judiciary of all sorts must be endowed not only with purity but capacity.

The need for judiciously contrived procedure is even greater in a country like Ceylon than in England. With us the common sense and non-litigious temperament of suitors carry proceedings with scarcely a jolt over many a defect in Procedure. The native of Ceylon is emphatically litigious, and uses litigation, both criminal and civil, as a weapon of offence against persons whom he wishes to annoy. False criminal charges and false civil claims are weapons very commonly resorted to. Again, unlike the Englishman, who, as a rule, likes to mind his own business and come in contact with legal machinery as little as possible, the native of Ceylon seems to court the interference of the law, and in the

performance of his own obligations is disposed to await its push. Perjury is as common in the Ceylon Courts as in those of India. Crime is sometimes committed solely in order to accuse some enemy of being the criminal. I remember a case in which some Sinhalese men murdered a Tamil for no purpose of plunder, and for no grudge whatever, but simply in order to accuse some fellow-villagers of being the murderers. It would be very difficult to convince the average villager that he does anything wrong when he suborns a string of false witnesses to convict an enemy of some offence which he really suspects him to have perpetrated, or commits perjury or forgery in order to secure some advantage to which he thinks he ought to be entitled. I recollect a witness who, on being cross-examined as to character, admitted that he had been convicted of forgery. The cross-examination over, the witness addressed the judge much as follows:—It appeared, he said, to him, that he had been questioned about the conviction with the view of disparaging his character, and having admitted the fact, he should like to be allowed to explain that the circumstances were by no means discreditable to him. 'The fact was,' he continued, 'that I and my sister had inherited a piece of land in undivided shares. I wanted the whole to be sold, but she would not agree. What could I do? I was obliged to take another woman before the notary, and say it was my sister come to join in the sale-deed.' It is not too much to say that in the large majority of contested cases which come before the Supreme Court in appeal the issues involve perjury on the one side or the other. As for instance, the plaintiff sues on a promissory note, and the defendant pleads forgery; or the defendant pleads payment, and the plaintiff denies the payment; or the plaintiff avers that he and his ancestors had been in quiet enjoyment of certain land up to a certain day when defendant forcibly ousted plaintiff, and defendant answers that he and his ancestry were always in possession, and plaintiff's party never had any enjoyment at all. As far back as 1833 a Commission, reporting generally on the Administration of Justice, commented on the custom of parties in their pleadings denying all the allegations of the other side, irrespective of truth, in the mere hope that something might happen to prevent their being proved at the trial. Much of the same spirit obtains now-a-days. I remember, indeed, a pleading drawn by a Eurasian lawyer in Crown employ, in which the pleader, not content with denying all the plaintiff's allegations made up to date, proceeded to deny by anticipation all allegations which the plaintiff might thereafter make in any future pleading. False testimony is a more scientific matter amongst the Tamils in the northern parts of the island than amongst the Sinhalese, and

the witnesses are sometimes exercised at a mock trial before the real one.

It is no light task to devise Law and Procedure which shall effect the maximum of good and the minimum of harm under such circumstances, and the task is all the harder on account of the difficulty of ascertaining what the natives themselves think about such matters. In England when the shoe pinches, public opinion expresses itself roundly, and the press ventilates the grievance. A timid and suspicious Eastern population has no expressed public opinion. Moreover, the few newspapers published in Ceylon report legal matters very ineffectively, and shortcomings in the administration of justice, which in the interest of the public should have publicity, are very commonly passed over in silence.

So much for the *a priori* importance and difficulties of the matter. We may pass on to the facts.

Ceylon is about the size of Ireland, and at the last census, in 1881, numbered close on 2,760,000 inhabitants. Of these rather more than two-thirds were Sinhalese, a race who migrated from India about 500 B.C. Of the remaining third not quite 700,000 were Tamils, a race identical with the Tamils of the Madras Presidency of India. About 185,000 were a race called by the English 'Moormen,' akin to the Mohlahs of Southern India and professing the Mahomedan religion. There were also nearly 18,000 Eurasians, and nearly 5000 Europeans. Roughly speaking, the Sinhalese inhabit the southern two-thirds of the island, and the Tamils the northern third; but nearly 200,000 of the Tamils were immigrant coolies employed on coffee-estates in the central province. Owing to the vicissitudes of the European planting enterprise, the number of these estate coolies has probably materially diminished since the census.

Comparing Ceylon with India, the subject-matter of government bears in its main characteristics a close resemblance to that of Southern India. Points of differentiation there are, partly assignable to the insular position of Ceylon, and partly brought about by different systems of government. Caste is in Ceylon a far less formidable matter than in India—a matter of social distinction rather than religion. Again, the remains of the joint family and the village-community systems seem largely to have been obliterated and crushed out by the methods of government adopted in Ceylon. Partly, perhaps, in consequence of Ceylon being long regarded as a Dutch 'colony' acquired by England, less consideration seems to have been shown for native traditions than in India. For instance, in India fines imposed by criminal courts are recovered from the defendant's moveable property only. In Ceylon it has always been

the practice to sell up the defendant's land ;—a very harsh measure where the people are passionately attached to their ancestral lands. Many a Sinhalese has been rendered a landless and desperate man by some Rs.50 fine imposed by a police magistrate, for the possession of illicit toddy or some other not very heinous offence. I remember an instance in which a Kandyan was sentenced in the police-court to three months' imprisonment and a fine of Rs.50. He emerged from gaol to find that his land had been sold for the fine, and bought by a man with whom he had a quarrel. The purchaser taunted him with his loss. He swore in his anger that his enemy should never cultivate the land, and, meeting him on the land when the time for tillage arrived, struck him a mortal blow with an axe or hoe. He was convicted of murder and suffered death. I am glad to say that under a recent Criminal Procedure Code land is no longer sold to pay fines. It is still, however, liable to be sold to pay for imprisoned convicts' maintenance in gaol.

Ceylon, being governed under the Colonial Office, is always styled a 'colony.' And yet the term seems a misnomer. For 'colony' means a settlement of immigrants, and the government of Ceylon is not the government of a colony in that sense. Our Australian dependencies are fairly styled colonies, the natives being few, savage, and fast disappearing, and the immigrants virtually the sole objects of government. The Dutch government in Ceylon also might fairly be called the government of a colony, inasmuch as the Dutch governed for the sake of the Dutch, and took small account of the welfare of the natives. Had we owned plantation of the isle in those days we might or might not have done the same. Now, however, we do profess to govern in the interest of all, native and immigrant alike. Still, it may be said, what difference can be made by the use of a mere epithet?—'Words in themselves,' says Bentham, 'are of no sort of consequence, but when they are made the foundation of practical institutions, then surely their propriety becomes worth investigating.' Perhaps if Ceylon had not been persistently styled a 'colony,' she might never have been saddled with one practical institution which has proved disastrously impracticable for her—I mean the Roman-Dutch Law.

The Roman-Dutch law, that is, the law which prevailed in the United Provinces of the Netherlands before it was superseded by the *Code Napoléon*, is the ultimate common law of Ceylon. For example, about fifteen years ago there was much conflict of judicial opinion on the question—whether, in cases of intestacy, the succession should go according to the law of North Holland or the law of

South Holland. At last the question was set at rest by an elaborate judgment of Chief Justice Sir Edward Creasy. The parties to the case in which that final determination was arrived at were Sinhalese, and the case, if entitled after English fashion, would have been styled *Wickreme Aratchigè* v. *Waputantrigè*. Many will deem this sufficiently absurd, but there is much worse behind. However, before describing further the ills for which the Roman-Dutch law is responsible, I must explain how the Roman-Dutch law got in at all.

Towards the close of the last century the Dutch were masters of some forts and plantations on the sea-board, and on the west coast they exercised more or less control over the intervening belts of territory. Over these possessions they administered their own Roman-Dutch law. About 1796 these Dutch possessions were ceded to us, and, by the usual rule, the law then in force in the ceded territory would remain in force until altered by the conquerors. Thus the Roman-Dutch law was continued as the common law for these strips of territory. In process of time we acquired dominion over the whole island, and still the Dutch law was supposed to govern our possessions, thus becoming the ultimate common law of the whole of Ceylon, and governing in places where no Dutchman ever set his foot. Certain native customary laws are administered in the central and northern provinces when ascertainable. Where these are silent the Dutch law, as expounded by Voet, Grœnewegen, and other Dutch jurists, must prevail. The mischief resulting from this it would be hard to exaggerate. At this day no one can read the Dutch law-books, and the Latin ones are practically beyond the capacity of the bulk of legal practitioners. The situation would indeed have been unbearable, had not English law pure and simple been imported into various important departments, such as Law of Evidence, Banking, Bills of Exchange, etc. Still, in the absence of special provision, the Dutch law governs. The present generation of lawyers, doing their business in English, derive their legal ideas largely from English text-books; English improvements and English civilization have spread all over the island, yet the common law is Dutch. But it is with regard to Procedure that the result has been most disastrous. As Dutch institutions dropped out of sight, much of the Dutch law became meaningless. English procedure and forms of pleading tacitly crept into use in indistinct and blurred fashion, without ever having been enacted or precised. The result is—chaos and confusion.

The Dutch Criminal Law has long been in great measure virtually obsolete; something—it is difficult to say how much—of English Criminal Law imperceptibly crept into use without express enact-

ment: and in point of fact, incredible as it may seem, the judges were left to administer a kind of equitable criminal law on their own responsibility. At last, after long years of uncertainty, this latter anomaly has been remedied by Codes of Criminal Law and Procedure (in which much has been borrowed from India), which came into operation at the beginning of this year.

Two other topics of Law have suffered a similar kind of paralysis arising from this halting between the English and Dutch systems, viz. Hypothec or Mortgage, and Administration of Deceased Persons' Estates. The natives traffic very largely in petty mortgages, down to the value even of a few rupees, and this uncertainty of the law operates very hardly and unwholesomely on them. It works much hardship also in the case of European mortgages on coffee or other estates, and many an English investor has found cause to rue it. Perhaps even more disastrous is the legal paralysis with regard to Administrations, arising simply from confusion between two inconsistent systems, the Dutch and the English. The Dutch system was one of paternal administration; the estate being taken out of the control even of an executor. The English system (followed in India) allows the executor or administrator to act on his own responsibility, and interferes only when special cause for interference is shown by some party interested. The Boards and Chambers which transacted this business in the Dutch times no longer exist, but the tradition of the Dutch Procedure still lingers in the rules of Court. The result is hopeless delay and confusion, to the advantage of no one save the local lawyers, as year after year, sometimes for tens of years, these administrations drag on.

Unlike India, Ceylon has no Courts in which justice is administered in the native languages[1], excepting, indeed, the 'Village Tribunals,' an institution akin to the Indian 'Panchayet,' which of late years has been partially introduced in some districts, with a jurisdiction limited to Rs.20. If a villager seeks to recover any sum between Rs.20 and Rs.100 he must sue in the Court of Requests, filing a libel written in the English language, and providing English translations of all documents he may use as evidence. Claims over Rs.100 must be preferred in the District Court, which has an unlimited civil jurisdiction. Similarly, petty criminal offences are punishable by police magistrates. The District Courts have a large criminal jurisdiction, though still limited. The graver offences, including capital crime, are disposed of in the Supreme Court by a

[1] The native languages are less employed for official matters in Ceylon than in India, and Europeans in Ceylon are in general less conversant with the vernacular than their brethren in India.

judge and jury. In all these Courts English is the legal language, and all the proceedings are conducted in English, by the aid of interpretation. As I have had no personal experience of the Indian vernacular Courts I will not pretend to say on which side the advantage lies, but there are certainly disadvantages inseparable from the employment in small cause courts of a language not understanded of the people. Perjury is made easier; and there is further the serious drawback that the native suitor, not understanding the language in which the proceedings are conducted, is placed wholly at the mercy of subordinate court officials and the local native and Eurasian lawyers. His evidence is interpreted to the judge, but the judge's observations are not necessarily interpreted to him; he very likely is never made aware of the judge's *ratio decidendi*, especially if (as too frequently happens) his case has failed through the inefficiency of his lawyer. There is, again, the further risk of the proceedings suffering from incorrect interpretation. I do not say that the proceedings in the Courts of First Instance suffer from dishonest interpretation; but I am afraid they suffer sometimes from sheer incompetency on the interpreter's part. The interpreters are but poorly paid, and interpretation needs no mean degree of intelligence, *plus* a very thorough knowledge of *both* the languages concerned. It has happened to me, when trying criminal charges on circuit, to find the rendering of a local interpreter characterised not merely by inaccuracy but by absolute distortion.

In the civil courts there is considerable miscarriage of justice—apart from what may be due simply to successful falsehood—arising from defective procedure, coupled with the inefficiency of the local practitioners. A vast number of law-suits run their course without the real facts in dispute—what lawyers call 'the merits'—having really come before the Court. The Supreme Court in Appeal has constantly the mortification of having to deal with long standing suits, in which the 'merits' have never been fairly reached. Passing to criminal matters, the tribunal in which the most miscarriages of justice take place is, I am afraid, that which is charged with the disposal of the gravest matters, viz. the Supreme Court. As I have already said, the graver criminal charges, including murder, are tried in the Supreme Court, by a judge and jury; and trial by jury is not an institution adapted to Ceylon. It was introduced in 1810, avowedly in the hope that it would exercise a valuable educational influence over the people, by promoting a regard for justice and truth. No account seems to have been made of the amount of injustice to be perpetrated by juries pending the completion of the educational process, or indeed of the improbability of injustice exercising any wholesome influence at all. In point of fact, after

nearly eighty years of experiment, trial by jury in Ceylon has proved a disastrous failure. Mr. Herbert Spencer has pointed out the futility of attempting to plant such an institution among people who 'lack that substratum of honesty and truthfulness on which alone it can stand.' 'To be of use,' he says, 'this, like any other institution, must be born of the popular character. It is not trial by jury that produces justice; but it is the sentiment of justice that produces trial by jury as the organ through which it is to act, and the organ will be inert unless the sentiment is there.' Far worse than inert; actively mischievous; so it is in Ceylon. The native and Eurasian jurors are deficient in what Mr. Spencer styles the sentiment of justice. If the circumstances offer no inducement to partiality, they still betray an indolent indifference and a conspicuous absence of any vigorous determination to unravel the truth. When a personage of any influence is tried by a jury of the natives and Eurasians of the district, the chances are decidedly in favour of an acquittal, however strong the evidence for the prosecution may be, unless indeed the private complainant be a personage of still greater local influence. In the town of Kalutara, a populous place midway between Galle and Colombo, no Supreme Court Criminal Session has been held for many years, for the simple and significant reason that the juries were so notoriously untrustworthy.

In other respects, also, the system is unsatisfactory. If the Ceylonese jurors lack the 'sentiment of justice,' the European jurors too often lack the necessary knowledge of the people. It must not be supposed that trial by jury in Ceylon means that the prisoner is tried by his peers. On the contrary, we have Sinhalese prisoners tried by Tamils, Eurasians, Europeans, and so forth. I have seen young English lads, newly arrived in the island, and entirely without experience of the people, sitting as jurors to hear native evidence and try Sinhalese and Tamil prisoners, perhaps for their lives. The jury is chosen from one of three panels, a panel of English-speaking jurors, a panel of Sinhalese-speaking jurors, and a panel of Tamil-speaking jurors. The vast majority of cases are tried by the English-speaking jury, which is composed of Europeans, Eurasians, and such natives as are supposed to understand English. I say supposed because there is every reason to believe that many of the natives who sit on the 'English' jury do not in fact understand English sufficiently to enable them to follow the proceedings intelligently. In short, the trial by jury is not trial of the prisoner by his peers, but by an arbitrary tribunal consisting of several lay judges of fact. The tribunal might still be an efficient one, but experience has proved it to be the reverse. In trials by jury in England the mass of testi-

mony laid before the jury is mostly true, and the main question is whether the facts thus disclosed indicate that the defendant is guilty or not guilty. On such a question the judge's summing-up is of much value to the jury, and can do no harm. In Ceylon the question in nine cases out of ten is—are the witnesses for the prosecution telling substantially the truth or are they lying? There are obvious objections to requiring judges to sum up to juries the considerations bearing upon such a question. The more exhaustive the summing up as an analysis of the case under trial, the more valuable it becomes to certain of the Court-frequenting population, as a practical lecture on the means of effectively getting up false evidence.

There is one exceptional jury, viz. the English-speaking jury at Kandy, which not infrequently consists almost to a man of English coffee-planters. This is a very intelligent jury, and if the parties and witnesses are Tamils, the planter-jury, being accustomed to deal with Tamils and understanding the language, can give a shrewd decision. When the case is Sinhalese, the planter-jury is less efficient: they are apt on the whole to believe too much of the evidence, and I have seen unjust convictions of Sinhalese defendants in such cases. If the charge be one of stealing coffee from a European estate, an inconvenience, to put the matter mildly, at once arises. A Sinhalese defendant charged with coffee-stealing by an English planter naturally objects to the planter-jury, and the prosecution, on the other hand, object equally to a Sinhalese jury.

Although criminal charges are investigated and defendants discharged or committed for trial by magistrates, mostly members of the Civil Service, the work of the magistrates is constantly supervised and controlled by certain legal officers, who constitute in effect a department of Public Prosecution. The original idea seems to have been that the magistrates, being laymen, would occasionally need the aid of professional lawyers. Gradually the department so far encroached on the civilian magistracy, that the latter were expected to refer everything to the department. To be thus kept in leading-strings is not likely to promote judicial strength on the part of the magistrates, besides which, the constant references backwards and forwards occasion unseemly delays. Perhaps a worse mischief is that, as the department of public prosecution is constituted, its proceedings hardly promote efficiency. We constantly find cases sent for trial which never should have been committed at all, prosecutions abandoned for no apparent reasons, indictments defective, and justice miscarrying because the Crown counsel imperfectly understood the nature of the evidence necessary

to sustain the charge. Apart from all question of legal skill, it would be impossible to overrate the amount of anxious care necessary in dealing with the criminal charges which natives bring against each other.

Municipalities have been introduced into Ceylon, with benches of municipal police magistrates officered by the municipal councillors, who are almost exclusively native and Eurasian. These municipal tribunals are fit only for abolition. Indeed the municipalities cannot in any sense be deemed very successful. The truth is that the population of Ceylon are hardly ripe for any form of self-government, and in attempts to introduce it there is always the probability of affording opportunities for oppression or illicit gain to unscrupulous Eurasians or English-speaking natives. Not long ago a statute had to be passed in order to disqualify for election to the municipal council of Colombo a disbarred native lawyer, who had recently emerged from gaol after undergoing a heavy sentence of imprisonment for a fraudulent crime. The municipal magistracy is a patent evil, but the timid native public will never raise their voice to ask for its abolition, while any proposal to do away with it will awaken clamorous opposition from those whose craft is in danger.

The people look to us to provide them with justice. 'You are our father and mother; we look to you'—the native villager often says to the English government officer. We have not given the people representative government, and indeed to attempt anything of the kind would be inhumane. It would be simply delivering the people into the hands of the native and Eurasian lawyers. A despotic goverment is the only government humanely possible, but we should never forget that it is a form of government which throws on us a very heavy responsibility. We are in effect governing a voiceless people, unable to tell us what institutions would best befit them. I might, had I space, go further into details and multiply illustrations, but enough has been already said to show that both in criminal and in civil matters the legal machinery which we have provided grinds out very unsatisfactory results. The mischief arising from all this miscarriage of justice extends very far beyond the individual cases in which the wrong is done. When influential criminals are acquitted and innocent men convicted on false charges crime becomes popularised. The would-be offender speculates on the chances of an acquittal, and conviction loses much of its deterrent effect in the face of the well-known fact that a considerable number of the inmates of the gaols are innocent men convicted on false testimony. I know of no sadder task than to listen, at the periodic gaol-visitations which Supreme Court judges make, to the pitiful protestations of native prisoners. Such protestations, of course, are

untruly as well as truly made, but it is undeniable that a large number of the convicts owe their convictions simply to unjust verdicts. Nor should we forget that civil failures of justice occasion much crime, particularly violent crime. It is a common thing for a judge, when sentencing a prisoner for some assault arising out of some village dispute, to say,—'You had no right to take the law into your own hands: there were the courts of justice open to your complaint.' I have often thought what a mockery such an address must seem to many a native prisoner.

Ceylon now has a newly made Penal Code and Code of Criminal Procedure. Time will soon test these. A Civil Procedure Code is urgently needed. Everything should be as simple as possible, bearing in mind that the suitors cannot command efficient professional aid in the Courts of First Instance. The Indian method, under which the issues are settled by the judge, is decidedly one to be adopted in Ceylon. The native and Eurasian lawyers, termed proctors, to whom is confided the bulk of the legal business of the island, occupy a very important and responsible position indeed, inasmuch as they are the means of communication between the Courts and the great mass of native suitors who do not understand the language in which the Courts do their business. Unhappily, speaking of these practitioners as a class, their proceedings are characterized by a low scale of professional morality and efficiency, and especially by an absence of the ability or disposition honestly to advise the client[1]. Indeed advice, properly so called, is almost unknown. The proctor ordinarily has little idea of making inquiry, before he commits his client to litigation—whether the facts afford a prospect of success. Of the many natives and Eurasians who now-a-days flock to England for legal education, it is much to be wished that some would spend some little while in the offices of English solicitors, for the simple purpose of learning how clients should be advised and cases got up. It is in these respects that the Ceylonese lawyers are especially deficient. But, unfortunately, the Ceylonese who goes to England for legal education thinks, as a rule, simply of obtaining his legal degree, and has no thought of acquiring in England any practical insight into the way in which legal business ought to be transacted.

All remains of the Roman-Dutch law should be cut down and grubbed up, root and branch. Codes, after the fashion of the Indian codes, are needed on many subjects. For example, by an ordinance

[1] Lawyers in Ceylon are divided into advocates and proctors, corresponding roughly to barristers and solicitors. I am now speaking in general terms of the proctors who appear in the Courts of First Instance.

enacted many years ago, the English Law of Evidence was introduced into Ceylon *en bloc;* and yet it is in many respects unsuited to the country, being based on the general assumption that testimony is in general truthful. Take, as an instance, what are termed 'dying declarations.' The English law admits these on the assumption that the declarant, being face to face with death, will not at such a supreme moment stain his soul with falsehood. Yet in the East the declarant's thought is not improbably this,—'In a few hours I shall be beyond the reach of judicial punishment; so I may as well pay off a few old scores.'

I have frequently heard the regret expressed that summary punishment is not meted out to the perjury so common in the Courts. Undoubtedly a summary dealing with the perjured witness in the presence of his fellow-villagers would be salutary, if practicable; but perjury is hardly an issue which can be disposed of summarily. The truth is that perjury will be most effectively checked, not so much by prosecutions and convictions as by depriving it of success. Let procedure be improved and the tribunals strengthened, so that perjury shall rarely succeed, and perjury will become comparatively rare. It is unhappily true that the natives are more dishonest in our Courts than in their own private life; and this is a fact which we should seriously lay to heart. The inefficiency of our administration of justice promotes dishonesty.

It will of course be understood that, in speaking as I have done of certain characteristics of native and Eurasian inhabitants of Ceylon, I have been speaking generally. Men of honour as well as ability are to be found in both classes. What I report is simply the average experience of the law courts.

Ceylon would probably be better off had she never been separated from the government of India. But, however that may be, one thing is certain, viz., that if the people are to have an efficient administration of justice, existing institutions must be extensively remodelled. In any efforts which may be made in that direction it should never be forgotten that in Ceylon, as in India, infinite harm may be done by an inconsiderate importation of English institutions. The task of devising institutions which will work efficiently in an Eastern dependency is so difficult that one can hardly be surprised if those on whom the responsibility rests are sometimes tempted to cut the knot by borrowing from England; and there is a speciously tempting show of magnanimity about that way of getting rid of the difficulty. A few phrases about equality, and the duty of sharing with our native fellow-subjects the glorious institutions of free England, and you get rid of the difficult task, at the expense of saddling the country with some institution efficient in the place

of its birth, but incapable of efficiency in the new soil. We are bound in justice to treat our native fellow-subjects as our equals. But equality is one thing: similarity is another. It is no kindness to them to legislate for them as though that which suits our home must necessarily suit theirs.

L. B. CLARENCE,
Senior Puisne Justice of the Supreme Court of Ceylon.

DUTIES OF INSURING SAFETY: THE RULE IN RYLANDS *v.* FLETCHER[1].

Exceptions to general limits of duties of caution.

IN general, those who in person go about an undertaking attended with risk to their neighbours, or set it in motion by the hand of a servant, are answerable for the conduct of that undertaking with diligence proportioned to the apparent risk. To this rule the policy of the law makes exceptions on both sides. Men are free to seek their own advantage in the ordinary pursuit of business or uses of property, though a probable or even intended result may be to diminish the profit or convenience of others. We now have to consider the cases where a stricter duty has been imposed. As a matter of history, such cases cannot easily be referred to any definite principle. But the ground on which a rule of strict obligation has been maintained and consolidated by modern authorities is the magnitude of the danger, coupled with the difficulty of proving negligence as the specific cause, in the particular event, of the danger having ripened into actual harm. The law might have been content with applying the general standard of reasonable care, in the sense that a reasonable man dealing with a dangerous thing—fire, flood-water, poison, deadly weapons, weights projecting or suspended over a thoroughfare, or whatsoever else it be—will exercise a keener foresight and use more anxious precaution than if it were an object unlikely to cause harm, such as a faggot, or a loaf of bread. A prudent man does not handle a loaded gun or a sharp sword in the same fashion as a stick or a shovel. But the course adopted in England has been to preclude questions of detail by making the duty absolute; or, if we prefer to put it in that form, to consolidate the judgment of fact into an unbending rule of law. The law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbour to such risk is held, although his act is not of itself wrongful, to insure his neighbour against any consequent harm not due to some cause beyond human foresight and control.

***Rylands* v. *Fletcher*.**

Various particular rules of this kind (now to be regarded as applications of a more general one) are recognized in our law from early times. The generalization was effected as late as 1868, by the leading case of *Rylands* v. *Fletcher*, where the judgment of the Exchequer Chamber delivered by Blackburn J. was adopted in terms by the House of Lords.

[1] Extracted from a forthcoming work on the Law of Torts, founded on lectures delivered in the Inns of Court.

The nature of the facts in *Fletcher* v. *Rylands*, and the question of law raised by them, are for our purpose best shown by the judgment itself[1]:—

'It appears from the statement in the case, that the plaintiff was damaged by his property being flooded by water, which, without any fault on his part, broke out of a reservoir, constructed on the defendants' land by the defendants' orders, and maintained by the defendants.

'It appears from the statement in the case, that the coal under the defendants' land had at some remote period been worked out; but this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. And it further appears that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but that these persons employed by them in the course of the work became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings. Judgment of Ex. Ch.

'It is found that the defendants personally were free from all blame, but that in fact proper care and skill was not used by the persons employed by them, to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

'The plaintiff, though free from all blame on his part, must bear the loss unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless while it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and

[1] L. R., 1 Ex. at p. 278, per Willes, Blackburn, Keating, Mellor, Montague Smith and Lush, JJ. For the statements of fact referred to, see at pp. 267-9.

prudent precautions, in order to keep it in, but no more. If the first be the law, the person who has brought on his land and keeps there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect. . . . .

'We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.'

Affirmation thereof by H. L.

Not only was this decision affirmed in the House of Lords[1], but the reasons given for it were fully confirmed. 'If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbours, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage[2].' It was not overlooked that a line had to be drawn between this rule and the general immunity given to landowners for

[1] *Rylands* v. *Fletcher*, L. R., 3 H. L. 330 (1868). [2] Lord Cranworth, at p. 340.

acts done in the 'natural user' of their land, or 'exercise of ordinary rights'—an immunity which extends, as had already been settled by the House of Lords itself[1], even to obviously probable consequences. Here Lord Cairns pointed out that the defendants had for their own purposes made 'a non-natural use' of their land, by collecting water 'in quantities and in a manner not the result of any work or operation on or under the land.'

The detailed illustration of the rule in *Rylands* v. *Fletcher*, as governing the mutual claims and duties of adjacent landowners, belongs to the law of property rather than to the subject of this work[2]. We shall return presently to the special classes of cases (more or less discussed in the judgment of the Exchequer Chamber) for which a similar rule of strict responsibility had been established earlier. As laying down a positive rule of law, the decision in *Rylands* v. *Fletcher* is not open to criticism in this country[3]. But in the judgment of the Exchequer Chamber itself the possibility of exceptions is suggested, and we shall see that the tendency of later decisions has been rather to encourage the discovery of exceptions than otherwise. A rule casting the responsibility of an insurer on innocent persons is a hard rule, though it may be a just one; and it needs to be maintained by very strong evidence[4] or on very clear grounds of policy. Now the judgment in *Fletcher* v. *Rylands*[5], carefully prepared as it evidently was, hardly seems to make such grounds clear enough for universal acceptance. The liability seems to be rested only in part on the evidently hazardous character of the state of things artificially maintained by the defendants on their land. In part the case is assimilated to that of a nuisance[6]; and in part, also, traces are apparent of the formerly prevalent theory that a man's voluntary acts, even when lawful and free from negligence, are *prima facie* done at his peril[7]: a theory which modern authorities have explicitly rejected in America, and do not encourage in England, except so far as *Rylands* v. *Fletcher* may itself be capable of being used for that purpose[8]. Putting that question aside, one does not see why the policy of the law might not have been satisfied

[1] *Chasemore* v. *Richards* (1859), 7 H. L. C. 349.

[2] See *Fletcher* v. *Smith*, 2 App. Ca. 781; *Humphries* v. *Cousins*, 2 C. P. D. 239; *Hurdman* v. *North Eastern Railway Co.*, C. A., 3 C. P. D. 168; and for the distinction as to 'natural course of user,' *Wilson* v. *Waddell*, H. L. (Sc.), 2 App. Ca. 95.

[3] Judicial opinions still differ in the United States. See Bigelow, L. C. 497–500. The case has been cited with approval in Massachusetts (*Shipley* v. *Fifty Associates*, 106 Mass. 194; *Gorham* v. *Gross*, 125 Mass. 232; *Mears* v. *Dole*, 135 Mass. 508); but distinctly disallowed in New York; *Losee* v. *Buchanan*, 51 N. Y. (6 Sickels) 476.

[4] See *Reg.* v. *Commissioners of Sewers for Essex* (C. A. 1885), 14 Q. B. D. 561.

[5] L. R. 1 Ex. 277 sqq.

[6] See especially at pp. 285–6. But can an isolated accident, however mischievous in its results, be a nuisance?

[7] L. R., 1 Ex. 286–7; 3 H. L. 341.

[8] See *The Nitro-glycerine Case* (1872), 15 Wall. 524; *Brown* v. *Kendall* (1850), 6 Cush. 292; *Holmes* v. *Mather* (1875), L. R., 10 Ex. 261.

by requiring the defendant to insure diligence in proportion to the manifest risk (not merely the diligence of himself and his servants, but the actual use of due care in the matter, whether by servants, contractors, or others), and throwing the burden of proof on him in cases where the matter is peculiarly within his knowledge. This indeed is what the law has done as regards duties of safe repair, as we shall presently see[1]. Doubtless it is possible to consider *Rylands* v. *Fletcher* as having only fixed a special rule about adjacent landowners[2]: but it was certainly intended to enunciate something much wider.

Character of later cases.

Yet no case has been found, not being closely similar in its facts, or within some previously recognized category, in which the unqualified rule of liability without proof of negligence has been enforced. We have cases where damages have been recovered for the loss of animals by the escape, if so it may be called, of poisonous vegetation or other matters from a neighbour's land. Thus the owner of yew trees, whose branches project over his boundary, so that his neighbour's horse eats of them and is thereby poisoned, is held liable[3]; and the same rule has been applied where a fence of wire rope was in bad repair, so that pieces of rusted iron wire fell from it into a close adjoining that of the occupier, who was bound to maintain the fence, and were swallowed by cattle which died thereof[4]. In these cases, however, it was not contended, nor was it possible to contend, that the defendants had used any care at all. The arguments for the defence went either on the acts complained of being within the 'natural user' of the land, or on the damage not being such as could have been reasonably anticipated[5]. We may add that having a tree, noxious or not, permanently projecting over a neighbour's land is of itself a nuisance, and letting decayed pieces of a fence, or anything else, fall upon a neighbour's land for want of due repair is of itself a trespass. Then in *Ballard* v. *Tomlinson*[6] the sewage collected by the defendant in his disused well was an absolutely noxious thing, and his case was, not that he had done his best to prevent it from percolating into the plaintiff's well, but that he was not bound to do anything.

Exception of act of God.

On the other hand, the rule in *Rylands* v. *Fletcher* has been decided by the Court of Appeal not to apply to damage of which the

[1] The subsequent part of the chapter, in which this is discussed, is not now printed.

[2] Martin B., L. R. 6 Ex., at p. 223.

[3] *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5 (1878); *Wilson* v. *Newberry*, L. R., 7 Q. B. 31 (1871), is not inconsistent, for there it was only averred that clippings from the defendant's yew trees were on the plaintiff's land; and the clipping might, for all that appeared, have been the act of a stranger.

[4] *Firth* v. *Bowling Iron Co.*, 3 C. P. D. 254 (1878).

[5] The former ground was chiefly relied on in Crowhurst's case, the latter in Firth's.

[6] C. A., 29 Ch. D. 115.

immediate cause is the act of God[1]. And the act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effects. It is enough that the accident should be such as human foresight could not be reasonably expected to anticipate; and whether it comes within this description is a question of fact[2]. The only material element of fact which distinguished the case referred to from *Rylands* v. *Fletcher* was that the overflow which burst the defendant's embankment, and set the stored-up water in destructive motion, was due to an extraordinary storm. Now it is not because due diligence has been used that an accident which nevertheless happens is attributable to the act of God. And experience of danger previously unknown may doubtless raise the standard of due diligence for after-time[3]. But the accidents that happen in spite of actual prudence, and yet might have been prevented by some reasonably conceivable prudence, are not numerous, nor are juries, even if able to appreciate so fine a distinction, likely to be much disposed to apply it[4]. The authority of *Rylands* v. *Fletcher* is unquestioned, but *Nichols* v. *Marsland* has practically empowered juries to mitigate the rule whenever its operation seems too harsh.

Act of stranger, &c.

Again, the principal rule does not apply where the immediate cause of damage is the act of a stranger[5], nor where the artificial work which is the source of danger is maintained for the common benefit of the plaintiff and the defendant[6]; and there is some ground for also making an exception where the immediate cause of the harm, though in itself trivial, is of a kind outside reasonable expectation[7].

[1] Act of God = vis maior = *θεοῦ βία*: see D. 19. 2. locati conducti, 25, s. 6. The classical signification of 'vis maior' is, however, wider for some purposes; *Nugent* v. *Smith*, C. A., 1 C. P. D. 423, 429, per Cockburn, C.J.

[2] *Nichols* v. *Marsland*, L. R., 10 Ex. 255, 2 Ex. D. 1 (1875-6). Note that Lord Bramwell, who in *Rylands* v. *Fletcher* took the view that ultimately prevailed, was also a party to this decision. The defendant was an owner of artificial pools, formed by damming a natural stream, into which the water was finally let off by a system of weirs. The rainfall accompanying an extremely violent thunderstorm broke the embankments, and the rush of water down the stream carried away four county bridges, in respect of which damage the action was brought.

[3] See *Reg.* v. *Commissioners of Sewers for Essex* (1885) in judgment of Q. B. D., 14 Q. B. D., at p. 574.

[4] 'Whenever the world grows wiser it convicts those that came before of negligence.' Bramwell, B., L. R., 6 Ex. at p. 222. But juries do not, unless the defendant is a railway company.

[5] *Box* v. *Jubb*, 4 Ex. D. 76; *Wilson* v. *Newberry*, L. R., 7 Q. B. 31, is really a decision on the same point.

[6] *Carstairs* v. *Taylor*, L. R., 6 Ex. 217 (1871); cp. *Madras Ry. Co.* v. *Zemindar of Carvatenagaram*, L. R., 1 Ind., App. 364.

[7] *Carstairs* v. *Taylor*, above, but the other ground seems the principal one. The plaintiff was the defendant's tenant; the defendant occupied the upper part of the house. A rat gnawed a hole in a rain-water box maintained by the defendant, and water escaped through it and damaged the plaintiff's goods on the ground floor.

Works required or authorized by law.

There is yet another exception in favour of persons acting in the performance of a legal duty, or in the exercise of powers specially conferred by law. Where a zamíndár maintained, and was by custom bound to maintain, an ancient tank for the general benefit of agriculture in the district, the Judicial Committee agreed with the High Court of Madras in holding that he was not liable for the consequences of an overflow caused by extraordinary rainfall, no negligence being shown[1]. In the climate of India the storing of water in artificial tanks is not only a natural but a necessary mode of using land[2]. In like manner the owners of a canal constructed under the authority of an Act of Parliament are not bound at their peril to keep the water from escaping into a mine worked under the canal[3]. On the same principle a railway company authorized by Parliament to use locomotive engines on its line is bound to take all reasonable measures of precaution to prevent the escape of fire from its engines, but is not bound to more. If, notwithstanding the best practicable care and caution, sparks do escape and set fire to the property of adjacent owners, the company is not liable[4]. The burden of proof appears to be on the company to show that due care was used[5], but there is some doubt as to this[6].

G.W.R. Co. of Canada v. *Braid.*

Some years before the decision of *Rylands* v. *Fletcher* the duty of a railway company as to the safe maintenance of its works was considered by the Judicial Committee on appeal from Upper Canada[7]. The persons whose rights against the company were in question were passengers in a train which fell into a gap in an embankment, the earth having given way by reason of a heavy rain-storm. It was held that 'the railway company ought to have constructed their works in such a manner as to be capable of

[1] *Madras Ry. Co.* v. *Zemindar of Carvatenagaram*, L. R., 1 Ind., App. 364; S. C., 14 Ben. L. R. 209.

[2] See per Holloway J., in the Court below, 6 Mad. H. C. at p. 184.

[3] *Dunn* v. *Birmingham Canal Co.*, Ex. Ch. (1872); L. R., 8 Ex. 42. The principle was hardly disputed, the point which caused some difficulty being whether the defendants were bound to exercise for the plaintiff's benefit certain optional powers given by the same statute.

[4] *Vaughan* v. *Taff Vale Ry. Co.* (Ex. Ch., 1860); 5 H. & N. 679; 29 L. J., Ex. 247; cp. L. R., 4 H. L., 201, 202; *Fremantle* v. *L. & N. W. Ry. Co.* (1861), 10 C. B., N. S. 89; 31 L. J., C. P. 12.

[5] The escape of sparks has been held to be *prima facie* evidence of negligence; *Piggott* v. *E. C. Ry. Co.* (1846), 3 C. B. 229; 15 L. J., C. P. 235; cp. per Blackburn J., in *Vaughan* v. *Taff Vale Ry. Co.*

[6] *Smith* v. *L. & S. W. Ry. Co.* (1870); Ex. Ch., L. R., 6 C. P. 14, seems to imply the contrary view; but *Piggott* v. *E. C. Ry. Co.* was not cited. It may be, that in the course of a generation, the presumption of negligence has been found no longer tenable, experience having shown the occasional escape of sparks to be consistent with all practicable care. Such a reaction would hardly have found favour, however, with the Court which decided *Fletcher* v. *Rylands* in the Exchequer Chamber.

[7] *G. W. Ry. Co. of Canada* v. *Braid* (1863), 1 Moo. P. C., N. S. 101. There were some minor points on the evidence (whether one of the sufferers was not travelling at his own risk, &c.), which were overruled or regarded as not open, and are therefore not noticed in the text.

resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur.' And the manner in which the evidence was dealt with amounts to holding that the failure of works of this kind under any violence of weather, not beyond reasonable prevision, is of itself evidence of negligence. Thus the duty affirmed is a strict duty of diligence, but not a duty of insurance. Let us suppose now (what is likely enough as matter of fact) that in an accident of this kind the collapse of the embankment throws water, or earth, or both, upon a neighbour's land so as to do damage there. The result of applying the rule in *Rylands* v. *Fletcher* will be that the duty of the railway company as landowner to the adjacent landowner is higher than its duty as carrier to persons whom it has contracted to carry safely; or property is more highly regarded than life and limb, and a general duty than a special one.

If the embankment was constructed under statutory authority (as in most cases it would be), that would bring the case within one of the recognized exceptions to *Rylands* v. *Fletcher*. But a difficulty which may vanish in practice is not therefore inconsiderable in principle.

Other cases of insurance liability.

We shall now shortly notice the authorities, antecedent to or independent of *Rylands* v. *Fletcher*, which establish the rule of absolute or all but absolute responsibility for certain special risks.

Duty of keeping in cattle.

Cattle trespass is an old and well settled head, perhaps the oldest. It is the nature of cattle and other live stock to stray if not kept in, and to do damage if they stray; and the owner is bound to keep them from straying on the land of others at his peril, though liable only for natural and probable consequences, not for an unexpected event, such as a horse not previously known to be vicious kicking a human being[1]. So strict is the rule, that if any part of an animal which the owner is bound to keep in is over the boundary, this constitutes a trespass. The owner of a stallion has been held liable on this ground for damage done by the horse kicking and biting the plaintiff's mare through a wire fence which separated their closes[2]. The result of the authorities is stated to be 'that in the case of animals trespassing on land, the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act if done by himself would have been a trespass[3].'

[1] *Cox* v. *Burbidge*, 13 C. B., N. S. 430; 32 L. J., C. P. 89.

[2] *Ellis* v. *Loftus Iron Co.*, L. R., 10 C. P. 10 (1874), a stronger case than *Lee* v. *Riley*, 18 C. B., N. S. 722; 34 L. J., C. P. 212 (1865), there cited and followed.

[3] Brett J., L. R., 10 C. P., at p. 13; cp. the remarks on the general law in *Smith* v. *Cook*, 1 Q. B. D. 79 (itself a case of contract).

Blackstone[1] says that 'a man is answerable for not only his own trespass, but that of his cattle also:' but in the same breath he speaks of 'negligent keeping' as the ground of liability, so that it seems doubtful whether the law was then clearly understood to be as it was laid down a century later in *Cox* v. *Burbidge*[2]. Observe that the only reason given in the earlier books (as indeed it still prevails in quite recent cases) is the archaic one that trespass by a man's cattle is equivalent to trespass by himself.

The rule does not apply to damage done by cattle straying off a highway on which they are being lawfully driven; in such case the owner is liable only on proof of negligence[3]; and the law is the same for a town street as for a country road[4].

'Whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as is the case with an ox,' is an undecided point. The better opinion seems to favour a negative answer[5].

Dangerous or vicious animals.

Closely connected with this doctrine is the responsibility of owners of dangerous animals. 'A person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril.' If it escapes and does mischief, he is liable without proof of negligence, neither is proof required that he knew the animal to be mischievous, if it is of a notoriously fierce or mischievous species[6]. If the animal is of a tame and domestic kind, the owner is liable only on proof that he knew the particular animal to be 'accustomed to bite mankind,' as the common form of pleading ran in the case of dogs, or otherwise vicious; but when such proof is supplied, the duty is absolute as in the former case. It is enough to show that the animal has on foregoing occasions manifested a savage disposition, whether with the actual result of doing mischief on any of those occasions or not[7]. But the necessity of proving the *scienter*, as it used to be called from the language of pleadings, is often a greater burden on the plaintiff than that of proving negligence would be; and as regards injury to cattle or sheep it has been done away with by statute. And the occupier of

[1] Comm. 3. 211.
[2] 13 C. B., N. S. 430; 32 L. J., C. P. 89.
[3] *Goodwin* v. *Cheveley*, 4 H. & N. 631; 28 L. J., Ex. 298 (1859). A contrary opinion was expressed by Littleton, 20 Ed. IV, cited in *Read* v. *Edwards*, 17 C. B., N. S. 245; 34 L. J., C. P., at p. 32.
[4] *Tillett* v. *Ward*, 10 Q. B. D. 17, where an ox being driven through a town strayed into a shop.
[5] *Read* v. *Edwards*, 17 C. B., N. S. 245; 34 L. J., C. P. 31 (1864).
[6] As a monkey: *May* v. *Burdett*, 9 Q. B. 101 (1846), and 1 Hale, P. C. 430, there cited.
[7] *Worth* v. *Gilling*, L. R., 2 C. P. 1 (1866). As to what is sufficient notice to the defendant through his servants, *Baldwin* v. *Casella*, L. R., 7 Ex. 325; *Applebee* v. *Percy*, L. R., 9 C. P. 647.

the place where a dog is kept is presumed for this purpose to be the owner of the dog [1].

The word 'cattle' includes horses [2] and perhaps pigs [3].

Fire, fire-arms, &c.

The risk incident to dealing with fire, fire-arms, explosive or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids, and (it is apprehended) poisons, is accounted by the Common Law among those which subject the actor to strict responsibility. Sometimes the term 'consummate care' is used to describe the amount of caution required: but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him.

Duty of keeping in fire.

As to fire, we find it in the fifteenth century stated to be the custom of the realm (which is the same thing as the common law) that every man must safely keep his own fire so that no damage in any wise happen to his neighbour [4]. In declaring on this custom, however, the averment was 'ignem suum *tam negligenter* custodivit:' and it does not appear whether the allegation of negligence was traversable or not [5]. We shall see that later authorities have adopted the stricter view.

The common-law rule applied to a fire made out of doors (for burning weeds or the like) as well as to fire in a dwelling-house [6]. Here too it looks as if negligence was the gist of the action, which is described (in Lord Raymond's report) as 'case grounded upon the common custom of the realm for negligently keeping his fire.' *Semble*, if the fire were carried by sudden tempest it would be excusable as the act of God. Liability for domestic fires has been dealt with by statute, and a man is not now answerable for damage done by a fire which began in his house or on his land by accident and without negligence [7].

The use of fire for non-domestic purposes, if we may coin the phrase, remains a ground of the strictest responsibility.

[1] 28 & 29 Vict. c. 60 (A.D. 1865). There is a similar Act for Scotland, 26 & 27 Vict. c. 100. See Campbell on Negligence, 2nd ed., pp. 53–55.

[2] *Wright* v. *Pearson*, L. R., 4 Q. B. 582 (1869). Further protection against mischievous or masterless dogs is given by 34 & 35 Vict. c. 56, a statute of public police regulation outside the scope of this work.

[3] *Child* v. *Hearn*, L. R., 9 Ex. 176 (on a different Act).

[4] Y. B. 2 Hen. IV. 18. pl. 5.

[5] Blackstone (1. 431) seems to assume negligence as a condition of liability.

[6] *Tubervil* or *Turberville* v. *Stamp*, 1 Salk. 13, s. c. 1 Ld. Raym. 264.

[7] 14 Geo. III. c. 78. s. 86, as interpreted in *Filliter* v. *Phippard*, 11 Q. B. 347; 17 L. J., Q. B. 89 (1847). There was an earlier statute of Anne to a like effect; 1 Blackst. Comm. 431; and see per Cur. in *Filliter* v. *Phippard*. It would seem that even at common law the defendant would not be liable unless he knowingly lighted or kept some fire to begin with; for otherwise how could it be described as *ignis suus*?

Carrying fire in locomotives.

Decisions of our own time have settled that one who brings fire into dangerous proximity to his neighbour's property, in such ways as by running locomotive engines on a railway without express statutory authority for their use [1], or bringing a traction engine on a highway [2], does so at his peril.

It seems permissible to entertain some doubt as to the historical foundation of this doctrine, and in the modern practice of the United States it has not found acceptance [3]. In New York it has, after careful discussion, been expressly disallowed [4].

Fire-arms: *Dixon* v. *Bell.*

Loaded fire-arms are regarded as highly dangerous things, and persons dealing with them are answerable for damage done by their explosion, even if they have used apparently sufficient precaution. A man sent his maidservant to fetch a flint-lock gun which was kept loaded, with a message to the master of the house to take out the priming first. This was done, and the gun delivered to the girl; she loitered on her errand, and (thinking, presumably, that the gun would not go off) pointed it in sport at a child and drew the trigger. The gun went off and the child was seriously wounded. The owner was held liable, although he had used care, perhaps as much care as would commonly be thought enough. 'It was incumbent on him who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents. The gun ought to have been so left as to be out of all reach of doing harm [5].' This amounts to saying that in dealing with a dangerous instrument of this kind the only caution that will be held adequate in point of law is to abolish its dangerous character altogether. Observe that the intervening negligence of

[1] *Jones* v. *Festiniog Ry. Co.*, L. R., 3 Q. B. 733. Here diligence was proved, but the company held nevertheless liable. The rule was expressly stated to be an application of the wider principle of *Rylands* v. *Fletcher*; see per Blackburn J., at p. 736.

[2] *Powell* v. *Fall* (C. A.), 5 Q. B. D. 597. The use of traction engines on highways is regulated by statute, but not authorized in the sense of diminishing the owner's liability for nuisance or otherwise; see the sections of the Locomotive Acts, 1861 and 1865, in the judgment of Mellor J., at p. 598. The dictum of Bramwell L. J., at p. 601, that *Vaughan* v. *Taff Vale Ry. Co.* (p. 58 above) was wrongly decided, is extra-judicial. That case was not only itself decided by a court of co-ordinate authority, but has been approved in the House of Lords; *Hammersmith Ry. Co.* v. *Brand*, L. R., 4 H. L., at p. 202; and see the opinion of Blackburn J., at p. 197.

[3] It appears to be held everywhere that unless the original act is in itself unlawful, the gist of the action is negligence; see Cooley on Torts, 589-594.

[4] *Losee* v. *Buchanan*, 51 N. Y. 476 (1873); the owner of a steam boiler was held not liable, independently of negligence, for an explosion which threw it into the plaintiff's buildings. For the previous authorities as to fire, uniformly holding that in order to succeed the plaintiff must prove negligence, see at pp. 487–8. *Rylands* v. *Fletcher* is disapproved as being in conflict with the current of American authority.

[5] *Dixon* v. *Bell* (1816), 5 M. & S. 198, and in Bigelow, L. C. It might have been said that sending an incompetent person to fetch a loaded gun was evidence of negligence (see the first count of the declaration); but that is not the ground taken by the Court (Lord Ellenborough C.J., and Bayley J.).

the servant (which could hardly by any ingenuity have been imputed to her master as being in the course of her employment) was no defence. Experience unhappily shows that if loaded fire-arms are left within the reach of children or fools, no consequence is more natural or probable than that some such person will discharge them to the injury of himself or others.

Explosives and other dangerous goods.

On a like principle it is held that people sending goods of an explosive or dangerous nature to be carried are bound to give reasonable notice of their nature, and, if they do not, are liable for resulting damage. So it was held where nitric acid was sent to a carrier without warning, and the carrier's servant, handling it as he would handle a vessel of any harmless fluid, was injured by its escape [1]. The same rule has been applied in British India to the case of an explosive mixture being sent for carriage by railway without warning of its character, and exploding in the railway company's office, where it was being handled along with other goods [2].

Gas escapes.

Gas (the ordinary illuminating coal-gas) is not of itself, perhaps, a dangerous thing, but with atmospheric air forms a highly dangerous explosive mixture, and also makes the mixed atmosphere incapable of supporting life [3]. Persons undertaking to deal with it are therefore bound, at all events, to use all reasonable diligence to prevent an escape which may have such results. A gas-fitter left an imperfectly connected tube in the place where he was working under a contract with the occupier; a third person, a servant of that occupier, entering the room with a light in fulfilment of his ordinary duties, was hurt by an explosion due to the escape of gas from the tube so left; the gas-fitter was held liable as for a 'misfeasance independent of contract [4].'

Poisonous drugs: *Thomas* v. *Winchester.*

Poisons can do as much mischief as loaded fire-arms or explosives, though the danger and the appropriate precautions are different.

A wholesale druggist in New York purported to sell extract of dandelion to a retail druggist. The thing delivered was in truth extract of belladonna, which by the negligence of the wholesale dealer's assistant had been wrongly labelled. By the retail druggist this extract was sold to a country practitioner, and by him to a customer who took it as and for extract of dandelion, and thereby was made seriously ill. The Court of Appeals held

[1] *Farrant* v. *Barnes* (1862), 11 C. B., N. S. 553; 31 L. J., C. P. 137. The duty seems to be antecedent, not incident, to the contract of carriage.
[2] *Lyell* v. *Ganga Dai*, I. L. R., 1 All. 60.
[3] See *Smith* v. *Boston Gas Light Co.*, 129 Mass., 318.
[4] *Parry* v. *Smith*, 4 C. P. D. 325 (Lopes J.). Negligence was found as a fact.

the wholesale dealer liable to the consumer. 'The defendant was a dealer in poisonous drugs .... The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label.' And the existence of a contract between the defendant and the immediate purchaser from him could make no difference, as its non-existence would have made none. 'The plaintiff's injury and their remedy would have stood on the same principle, if the defendant had given the belladonna to Dr. Foord' (the country practitioner) 'without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale'—or administration without sale—'on the faith of the label[1].' This case has been thought in England to go too far; but it is hard to see in what respect it goes farther than *Dixon* v. *Bell*. So far as the cases are dissimilar, the damage would seem to be not more but less remote. If one sends belladonna into the world labelled as dandelion (the two extracts being otherwise distinguishable only by minute examination), it is a more than probable consequence that some one will take it as and for dandelion and be the worse for it: and this without any action on the part of others necessarily involving want of due care[2].

It can hardly be said that a wrongly labelled poison, whose true character is not discoverable by any ordinary examination such as a careful purchaser could or would make, is in itself less dangerous than a loaded gun. The event, indeed, shows the contrary.

Difficulties felt in England: *George* v. *Skivington*.

Nevertheless, difficulties are felt in England about admitting this application of a principle which in other directions is both more widely and more strictly applied in this country than in the United States[3]. In 1869 the Court of Exchequer made a rather hesitating step towards it, putting their judgment partly on the ground that the dispenser of the mischievous drug (in this case a hair wash) knew that it was intended to be used by the very person whom it in fact injured[4]. The cause of action seems to have been treated as in the nature of deceit, and *Thomas* v. *Winchester* does not seem to have been known either to counsel or to the Court. In the line actually taken one sees the tendency to assume that the ground of liability, if any, must be either warranty or fraud. But this is erroneous, as the judgment in *Thomas* v.

[1] *Thomas* v. *Winchester*, 6 N. Y. 397; Bigelow, L. C. 602 (1852).

[2] The jury found that there was not any negligence on the part of the intermediate dealers; the Court, however, were of opinion that this was immaterial.

[3] See per Brett, M.R., *Heaven* v. *Pender*, 11 Q. B. D., at p. 514, in a judgment which itself endeavours to lay down a much wider rule.

[4] *George* v. *Skivington*, L. R., 5 Ex. 1.

Winchester carefully and clearly shows. Whether that case was well decided appears to be a perfectly open question for our Courts[1]. In the present writer's opinion it is good law, and ought to be followed.

FREDERICK POLLOCK.

[1] *Dixon* v. *Bell*, *supra*, has never been disapproved that we know of, but has not been so actively followed that the Court of Appeal need be precluded from free discussion of the principle involved. In *Langridge* v. *Levy* (1837), 2 M. & W., at p. 530, the Court was somewhat astute to avoid discussing that principle, and declined to commit itself.

THE ANTWERP CONGRESS AND THE ASSIMILATION OF MERCANTILE LAW.

THE Belgian government in its report to King Leopold on the proposed Congress described its scope and objects as follows:

'Commercial relations are at the present day nothing if not international; they are becoming more and more so, and what a leap forward they would take if they were emancipated from the obstacles, uncertainty, and expense arising from diversity of laws! The work will be one of long duration and will have to be maturely considered, but unity might now be achieved without serious impediments in several departments of mercantile law, such as those relating to bills of exchange, carriers, and merchant-shipping. . . . . Merchant-shipping law has been the subject of much consideration with a view to uniform regulation. The same may be said of the law of bills of exchange; the different laws governing negotiable instruments are so similar, that to bring them into a state of uniformity seems to present no very great difficulty. The unification of these branches of the law would insure priceless advantages to commerce. . . . . The Antwerp Exhibition will bring to our country representatives of the commerce and industry of the two hemispheres, and will thus be an excellent opportunity of convening to a Congress the lawyers, publicists, and merchants of Belgium and foreign countries. Organised under the auspices of the government of the King of the Belgians, it would no doubt receive the co-operation of foreign governments.'

Thus the questions to be discussed were limited to those which had already been the subject of efforts in the direction of assimilation. Later on the organisers also struck out the law of carriers, so that ultimately the matters for discussion were narrowed down to the law of bills of exchange and merchant-shipping.

Invitations in accordance with the ministerial programme were issued to governments, corporations, banks, chambers of commerce, tribunals of commerce, bars, underwriters' associations, &c. No less than fifteen governments, viz. those of the Argentine Republic, Spain, the United States, Finland, France, Italy, Japan, Luxemburg, the Netherlands, Portugal, Roumania, Russia, Servia, Sweden and Norway, and Switzerland, responded to the Belgian invitation, and sent delegates to take part in the proceedings. As the Congress had no official character beyond enjoying the patronage of the King and his government, the delegates took part in the discussion as individuals without reference to their representative capacity.

The English government sent no delegates, but Sir John Gorst, solicitor-general, and Mr. W. F. Robinson, Q.C., attended on behalf of the English bar. The other English delegates present were Sir Travers Twiss, Q.C., Ernest Wendt, D.C.L., of London, Mr. J. W. Crombie, Sheriff Dove Wilson, LL.D., of Aberdeen, and the present writer, all of whom took an active part in the deliberations of the Congress[1].

The unification of law is an idea foreign to the English legal mind. It more or less implies the supposition that nations should at a given moment send delegates to a conference to negotiate a uniform law by means of reciprocal concessions, entailing perhaps a sacrifice of time-honoured legal notions in favour of provisions of systems of law reared in a different legal and political atmosphere, all of which is apt to strike the English mind as profoundly unpractical. The common law of England, moreover, being a part of the national morals, and fancied to be identical with well-established customs, it is difficult to conceive its amendment in the direction of unification without exhaustive codification. On the continent this codification for the most part exists; nations have grown accustomed to codes of written principles, and where lawyers and laymen, judges and pleaders can always appeal to a text, the text can be altered without the inconvenience which would attend the enactment of a text on any branch of the law, while the principles underlying it were still unwritten, innate, as it were, in the national conscience and imperceptibly varying with it.

The Congress at Antwerp brought out this difference very

[1] The Honorary President of the Congress was M. Beernaert, the Prime Minister, and the acting President Baron Lambermont, Minister of State, both of whom took much interest in its proceedings.

The Congress was divided into two Sections, one for Bills of Exchange Law, and the other for the Law of Merchant Shipping. The former was presided over by M. Pirmez, Minister of State, member of the Chamber of Representatives, manager of the National Bank, assisted by the talented young Professor Nyssens of Louvain, M. Dubois, avocat, and M. Ruyters, LL.D., Secretary of the Bank of Brussels, secretaries. The other section was divided into sub-committees, which prepared reports in the morning. These were discussed in the afternoon at the full meeting, under the presidency of M. Victor Jacobs, avocat, member of the Chamber of Representatives, and ex-minister. Among the learned jurists present, besides those already mentioned, were Judge Charles Peabody of New York, M. Gonsse, Director of the French Ministry of Justice, Professor Lyon-Caen of Paris, M. Daguin, secretary of the *Société de Législation comparée*, MM. Clunet, editor of the *Journal du droit International Privé*, and Constant, editor of the *France Judiciaire*, M. Rolin-Jacquemyns, president of the Institute of International Law, MM. Lejeune and Picard, advocates of the Belgian Court of Cassation, M. Sainctelette, of the Belgian Chamber of Representatives, M. Vrancken, dean of the Faculty of Advocates of Antwerp, MM. Georges de Laveleye and Hubert Brunard, advocates and editors of the *Moniteur des Intérêts Matériels*, Professors Namur and Victor d'Hondt, M. Boselli, of the Italian Parliament, Professor Marghieri, of Naples, and Advocate Norsa of Milan, Professors Asser and Molengraaf of Holland, Professor de Wreden and M. Arthur Raffalovich of St. Petersburg, Professor Speiser of Bâle, M. Guillaume, solicitor of the Bank of France, Mr. Engels, the Antwerp shipowner, His Excellency Delfin B. Huergo, Argentine Minister at Brussels, and M. de Montgomery, Procureur-General of Finland, &c.

clearly. 'You English seem to think it negotiating to grant us your gracious permission to adopt your laws *telles quelles*,' exclaimed an exasperated Frenchman, in reply to an Englishman who thought he had given a sufficient reason for his dissent in saying that a proposal differed from English law. 'But we have come here to make compromises in the interest of harmony. If we were all to make reservations where our laws differed, the results of this Congress would simply be that we agreed where we were already at one, and reserved all points we had come here to discuss.'

I am afraid this is a true picture, but in pleading guilty we must ask the enlightened foreigner to remember that we old-fashioned English have no code of laws yet, and that the principles of our law still lie hidden in the bosoms of our great lawyers, who do not seem to think very highly of systems which would lower the standard of intelligence necessary for discovering the sense and sequence of our beautiful case-law. Hence as regards England it is doubtful whether this Congress and its successors are destined to bear much fruit in the way contemplated by the Belgian government, that is to say, in the way of unification. All that can be expected on the part of England is an acceleration of that natural assimilation towards which similar circumstances and similar *desiderata* are causing contemporary legislation to tend.

On the continent, on the contrary, unification of laws has entered the domain of practice. Virtual unification was achieved by the influence and adoption in several states of the French codes bodily, and without wishing to compare a servile imitation with the spontaneous and free adoption of an identical law as proposed by the organisers of the Antwerp Congress, I cannot help remarking that in these different states improvement in accordance with domestic necessities has outweighed all considerations of international uniformity. Subsequently the German Code of Commerce of 1861 unified the legislations of upwards of a score of German states. But it is especially through the law of bills of exchange that progress in unification has been achieved on a large scale, beyond as well as within ethnographical limits. In fact, the law of bills of exchange has been a forerunner in unification. The *Wechselordnung* of 1848 in German lands, and in Great Britain the Act of 1882, have been the first practical steps towards the codified unification of German and Anglo-Scottish Common Law. The law of bills of exchange has also been the first branch selected in the unification of Swedo-Norwegian and Danish law. It is identical by an international act—the first case, perhaps, on record in which two perfectly independent states have by deliberate negotiation made a portion of their private law uniform.

The part of the new Swiss code of obligations relating to bills of exchange was in itself a unification of the different laws of the Swiss cantons, and as the commission now engaged in recasting the Russian law of bills of exchange has taken the Scandinavian Act as the basis of its operations, there will probably before long be another law to add to those belonging to an assimilated group.

Even in recalcitrant England something has been done, and that partly unawares, towards unification. The Bills of Exchange Act, 1882, in all but two points unifying English and Scotch law, and thereby adopting the Scotch rule of making the bill negotiable unless negotiability is specifically negatived, has brought our law into further harmony with that of Germany. Of late years, in fact, so strong a tendency to assimilation has been manifested in the alterations several states have made in their respective laws on the subject, that at the present moment the laws of six independent states on bills of exchange are well-nigh identical.

There are at the present moment three groups of laws on bills of exchange which might almost be regarded as three different stages of the law.

French law treats the bill as mere evidence of a transaction. Faithful to this theory, it requires some specification on the face of the instrument of the value received as well as a sufficient distance between the places where the bill is drawn and where payable, to raise a presumption that a debt is being discharged.

German law, on the contrary, holds that the bill of exchange constitutes a substantive contract, the form of which dispenses with the necessity of a valuable consideration. As a consequence of this theory no indication of value received or *distantia loci* is requisite. But the formal character of the instrument is such that it must even bear the words 'Bill of Exchange,' or other equivalent words, on its face.

English law, which at one time more resembled the present law of France, is now in a state of transition. It has very nearly reached the German stage. The necessity of the value clause and the *distantia loci* have disappeared, but a consideration is still required as in the case of all simple contracts, though there is a legal presumption in favour of its existence.

Italy, Belgium, Holland, Spain, Portugal, Greece, and several South American States, adopted the French Code of Commerce, comprising the law of bills of exchange, almost bodily; but all these, as I have said, have since then made more or less important changes in their laws.

Germany, divided into a multitude of small principalities with

fifty-nine different laws on bills of exchange, in 1847 took the first step in unification, and the following year the North German States adopted a uniform law on bills of exchange, which has been the model on which since then seven European states have recast their law on the same subject. Austria-Hungary, Sweden and Norway, Denmark, and Switzerland have in turn adopted the German law, with only modifications of secondary importance. The Belgians, in their new code of commerce, have suppressed the *distantia loci*, and the necessity of the indication of the value received, and thus brought their law into greater harmony with the law of Germany, and Italy has even adopted many of the minor provisions of German law, and has imported also certain improvements from the Belgian code.

It is seen that the assimilation of the laws relating to bills of exchange has already made considerable progress. It is therefore not surprising that continental jurists of eminence, like M. Asser of Amsterdam, M. Lyon-Caen of Paris, and Professor Cohn of Heidelberg, have ceased to look upon unification as a mere utopia.

In selecting bills of exchange law for one of the subjects of the Conference the Belgian government was well advised. The bill of exchange is an instrument which all modern legislation invests with a special character. The interests of trade demand that the rights and duties of the parties should be strictly defined and observed. A bill in passing from indorser to indorsee or from hand to hand across a number of frontiers, becomes invested with a web of qualities which often lead to complication and loss to the holder when the bill is dishonoured. Negotiation would certainly be more easy if the liabilities under the instrument were practically identical in different countries.

Two projects were submitted as a basis for the deliberations of the Congress, that of the Institute of International Law in 135 articles, and another in 58 articles specially drawn up by the Belgian Commission[1]. The latter was chosen by the Congress for discussion. This project was a compromise between the French, German, and English theories. The *distantia loci* and the necessity of the specification of the value, required by French law but no longer required by Belgian law, were shelved; the German requirement of the indication of the character of the instrument by the writing of the words 'bill of exchange' or other analogous words, adopted by a large number of states, was omitted; bills to bearer, not recognised by any but Anglo-American

[1] The 25 articles of the Association for the Reform and Codification of the Law of Nations a large number of which were drawn up at Antwerp were, strange to say, overlooked.

law, were allowed. The Franco-Belgian institution of the 'provision' (cover) was retained, &c., &c.

It was discovered when a little too late that a cut-and-dry scheme of this kind was not well suited for a Congress bound to get through its work in four days and necessarily composed for the greater part of gentlemen more familiar with their own laws than with those of foreigners. The result was that the articles were voted with little alteration by the French and Belgian members, and the articles adopted are still a project for discussion though on the whole an improvement on the original project. It is however a significant sign that the French members were in general in favour of renouncing to a great degree the antiquated notion of the bill of exchange underlying French law, and that the Belgians were not unfavourable to bills to bearer.

M. Pirmez, the Belgian Minister of State, made an excellent proposal, which will recommend itself especially to practical men. It was to institute an international stamp for negotiable instruments after the fashion of the postage stamp, so that a bill properly stamped at the place of issue may pass from country to country without the incumbrance of the formality of fresh stamping or *visa*. This seems a very feasible proposal apart from the fiscal consideration, which however has had to yield in both postal and telegraph arrangements for the benefit of international communications.

In maritime law the Congress was on the whole better prepared by preliminary work, the Belgian members having published exhaustive questionnaires and replies, besides quite a comparative literature on the subject.

The subject-matter submitted for discussion comprised—conflict of laws, liability of shipowners, collisions, average, insurance and bottomry bonds,—a vast area for four days, though the committees and sub-committees worked morning and afternoon. In fact, a part of the programme could not be discussed for want of time.

Space will not permit of my doing more than give a short account of some of the chief matters of interest on which there was an important difference of opinion.

Under conflict of laws a lively discussion took place as to whether general average, subject to agreement to the contrary, should be adjusted according to the law of the place where the adjustment is made, viz. at the port of discharge or according to the law of the flag. In nearly all states adjustment is governed by the law of the place of discharge. This is probably not so much on account of the ship being a movable as on account of the practical inconvenience of adjusting average according to rules not recog-

nised at the port where the adjustment takes place. A ship is a very exceptional kind of movable, to which the ordinary maxims are not always applicable. The place of destination or rather of discharge seems least in disaccord with the general character of the venture.

M. Lyon-Caen, the Paris professor, in his 'Études de droit international privé maritime,' points out that the port of discharge can never be certain beforehand. An accident may prevent the ship from continuing its voyage, and the adjustment may take place in the port where the ship has to stop. Moreover ships have frequently an 'eventual' destination. The result of the existing rule, says M. Lyon-Caen, is that, as the captain may be instructed when in the roads to unload wherever the owner likes, either say in England, France, or Germany, the owner is lord of the adjustment. He asks whether it is fair to invest the owner with such a discretion over the other interests involved. The advantage to the freighters of knowing beforehand what law will govern their engagement outweighs, in his opinion, all other considerations.

As a fact no shipper is likely to embrace in his calculations respecting a freight the *modus operandi* of adjusting possible average.

M. Lyon-Caen ably propounded his theory at the Congress, and was successful in getting it carried in the sub-committee, but the majority of those present at the plenary meeting were in favour of the existing rule, viz. that the adjustment of average is governed by the law of the port of discharge. M. Jules Vrancken, of Antwerp, even thought that to alter the existing rule would not so much tend to uniformity, which virtually existed on this point, as to confusion and anarchy.

Two other interesting questions of the conflict of laws were collisions and salvage.

It was decided that if a collision took place in ports, rivers, or other internal waters, the law of the place where it occurred should apply. If the collision took place on the sea, between two vessels of the same flag, it should be governed by the law of the flag. If the vessels were of different flags, each should be bound within the limits of the law of its flag, and precluded from receiving more than that law grants.

As regards remuneration for aid to ships in distress, it was decided that the law of the place where the aid was given should be applied for internal waters, and the law of the assisting ship for territorial waters and the high sea, an encouragement, as M. Clunet of Paris pointed out, to aiding ships in distress. The English delegates were, on the contrary, in favour of the law of the place into which the salvor brought the property saved.

Some important points were raised in the matter of insurance. Large numbers of insurances are effected in Belgium on expected profits, and these are held valid by the Belgian Courts. Although this is contrary to the principle that a contract of insurance is a contract of indemnity, and insurances in theory ought to be valid only for such objects and to the extent of the interest the assured is able to prove, general commercial usage has tended to sanction this deviation from principle. It was therefore contended that the clause 'policies to be proof of interest' ought to be allowed. This was not, however, the view taken by the Congress, which held that the validity of this clause merely led to speculative transactions. It was therefore resolved that insurance being a contract of indemnity the insurer ought to be able, notwithstanding any stipulation to the contrary, and even where there is no fraud, to contest the value imputed by the policy to the object insured at the place and time of starting.

As regards the question of whether in the case of multiple insurances the date should govern the validity of the risk, Dr. Wendt of London suggested that the underwriters in all *bonâ fide* insurances on the same risk should rateably participate in it for good or bad. Sir John Gorst and Judge Peabody supported this view, but the majority did not endorse it, and the resolution voted makes the order of the dates of the insurances the criterion of their application.

The English delegates after a long controversy carried, however, the abolition of the rule that the loss of three-fourths of an insured object entitles the insured to abandonment to the underwriters and to payment of the insured value as if there had been a total loss. It was all the same resolved that a vessel which cannot be repaired shall be held a total loss.

The subject of general average which has already been referred to under conflict of laws, was the subject of some interesting resolutions.

As regards the question whether the rules relating to general average ought not to be modified when the sacrifice made for common safety was caused by a fault of the captain, of the crew, or of a person interested in the cargo, or by a latent defect in ship or cargo, it was decided that they should apply even in such cases. It was further decided that the recourse arising from such fault or latent defect must be independent of the adjustment of average.

The contributing elements it was resolved should consist of:

1. The net integral value which the things sacrificed would have had at the time and place of discharge.

2. The net integral value at the same time and place of the

things saved as well as the amount of the damage suffered by them for the common safety.

3. The net freight to be made.

The effects and wages of the crew, the luggage of the passengers, the ammunition and victuals necessary for the voyage, though reimbursed by contribution, the case arising, it was resolved should not contribute.

The words 'at the time and place of discharge' gave rise to some discussion. Sir Travers Twiss preferred 'at the port of destination,' Sir John Gorst 'at the place of discharge of the rest of the cargo,' M. Langlois 'at the place where the cargo is delivered,' M. Jacobs 'at the place where ship and cargo part.' It was finally resolved that the text of the sub-committee should be maintained, and the article was therefore adopted as applying to ordinary cases. *Lex statuit de eo quod plerumque fit.*

I shall conclude with the question of chief practical interest, viz. the clause of non-liability of the owners for the acts of captain and crew in Bills of Lading. The insertion of this clause is of recent date. Formerly, in bills of lading, non-liability was confined to such indications as 'weight and contents unknown,' and to breakage and leakage. M. de Courcy traces the non-liability clause to the case of the 'Floride,' which sank in its berth at Hâvre in 1866, owing to negligence of the crew in leaving open certain tubes or apertures in connection with the machinery, which ought to have been closed. The owners (the *Compagnie générale Transatlantique*) had to pay heavily for the damage sustained by the cargo, and from that day they inserted a non-liability clause in their bills of lading, which passed thence into the bills of lading of other companies, and found especial favour in England. Whether M. de Courcy is right or wrong as to the origin of the clause, it is in general use at the present day. The shipowners justify it by the rapid increase of late years in the risks of navigation, through latent faults of machinery, and through the frequency of collisions entailed by the large number of fast-sailing vessels crossing each other in all directions. The cargo, moreover, no longer reaches its destination in the old direct manner. Cargoes are shipped for several ports. Loading and unloading take place at each, with precipitation often by night, and consequently with a supervision which is necessarily imperfect. Along with these greater risks the competition for freights has reduced the margin of profit. The shipowner is thus forced to restrict his liability, and this he now does to the extent of negativing it even for negligence on the part of his servants.

The freighters and insurers, on the other hand, contend that this is making an exception to the law relating to carriers which is

not warranted by circumstances. Steamships are easier to manipulate than sailing vessels, but the owners must select proper men for their management. Non-liability results in less care in the selection, with greater risk not only to the cargo but also to human life.

The question is now to find a basis of compromise acceptable to all parties. A model Bill of Lading was drawn up in 1882, by the Association for the Reform and Codification of the Law of Nations, at Liverpool, not exactly the place at which a model was likely to be framed suitable to more than one section of the interested parties. This Bill placed, as the shipowners wish, negligence on the same line with errors of judgment.

The American bill on the subject forbids the shipowner to except his liability for negligence or failure in proper stowage, custody and care of the merchandise or in the proper equipment of the vessel.

The form recommended by the Baltic committee (Mediterranean, Black Sea, and Baltic grain cargo steamer bill of lading), while more or less adopting the provisions of the American bill, exempts the owner from liability for strandings and collisions and all losses and damage caused thereby, even when occasioned by negligence, default, or error in judgment, of the pilot, master, mariners, or other servants of the shipowners.

The bill of lading drawn up by the Hamburg Chamber of Commerce last autumn in view of the meeting of the Association for the Reform and Codification of the Law of Nations, followed in general the principle of the Baltic model, viz. in allowing the shipowners to exempt themselves from liability for loss arising from collisions, strandings and other accidents of navigation, even though occasioned by the fault, negligence, or error of judgment of the pilot, master, &c. This, however, was not adopted, and was modified so as to forbid the shipowner to except negligence but not errors of judgment.

The Congress at Antwerp had to choose among these different propositions, between excepting collisions and strandings generally even when caused by negligence, forbidding the shipowner to exempt himself from liability to take care of the merchandise confided to his charge with any other exception than dangers of the sea and *vis major*, and the distinction between negligence and error of judgment. It chose a middle course in resorting to the distinction of Roman and continental law between *culpa lata* and *culpis levis* (gross and slight negligence).

The articles of the project relating to the liability of shipowners are as follows:

'The shipowners are civilly liable to the freighters and shippers for the acts of their captains and servants (*préposés*) in regard to

the cargo, unless they can prove that the damage has been occasioned by *vis major*, latent source of damage in the cargo or from the negligence of the consignor.

'The parties may nevertheless exempt themselves by special stipulations from this liability with the following exceptions:

'No shipowner shall exempt himself by a clause inserted in the charter-party, bill of lading, or other agreement from liability.

'*A.* For any acts of the captain or their servants tending to jeopardise the perfect seaworthiness of the vessel;

'*B.* For any acts which might occasion damage by bad stowage, want of care, or incomplete delivery of the goods confided to their custody;

'*C.* For any barratry, any deeds, acts or negligence having the character of gross negligence (*faute lourde*).

'The liability of the shipowners arising from the acts and engagements of their servants is limited to the value of the ship and freight. They may relieve themselves from this liability by the abandonment of the ship and freight or their value at the time of proceedings.'

Whether the distinction between gross and slight negligence is a great improvement on the distinction between negligence and errors of judgment I feel some doubt in saying. *Faute lourde* (gross negligence) is such negligence as not even a man wanting in ordinary diligence would commit. The shipowner therefore, if the Antwerp rule were adopted, would not be permitted to exempt himself from a kind of negligence seldom occurring, and would be able as heretofore to guard himself against the consequences of negligence of a lesser character which is the kind which would probably nearly always be found where damage to the cargo occurred. Still such a distinction through the discretion it would vest in the Court would soon lead to a specification of the acts constituting gross negligence, which might place the matter on a basis more suitable for all parties than it is at present. Whether, with the increase of liability, freights would rise, and whether uniformity would ensue from so vague a solution, remains to be considered.

It is difficult and even premature to express an opinion as to whether the efforts the King of the Belgians has taken under his patronage will lead to the adoption of a uniform law. The work done at the Congress was generally admitted to be only preliminary, and the King signified his intention of convening another Congress next year, to continue the labours of this. All that thus far can be said of the progress made is that ideas and hopes of assimilation hitherto left to the initiative and agitation of private

associations, have now found a patron in the enlightened sovereign and government of a country whose title to be listened to in the arts of peace is unchallenged.

Whether unification is an object worth achieving or possible on the part of a state like England is a matter for the future and not for the present.

Before we get the length of unification there are stages to be passed which will afford us plenty of opportunities to consider the feasibility of adopting laws identical with those of our continental neighbours. Assimilation, on the other hand, as I have shown, is constantly making progress, and the Congress held and those to be hereafter convened by King Leopold will certainly afford matter for the examination of law reformers in England.

That the codification of our chaotic mercantile law will some day be a practical question is certain. When this codification takes place it will be for the framers of the new code to discuss whether any amendment of the law shall be effected in the direction of unification [1]. Meanwhile Englishmen who hope for any such consummation will not be exposing themselves to the charge of being visionaries if they take an active part in the future Congresses held in continuation of that of 1885 at Antwerp with a view, if nothing else, to checking with their practical sense and experience the tendency of many Continental jurists of eminence to think everything possible by Act of Parliament or decree of the State.

THOMAS BARCLAY.

[1] On this point see the short but weighty dissenting opinion of Mr. Justice Willes annexed to the second report of the Digest of Law Commission, 1870.

MISTAKE OF LAW AGAIN.

IN the July Number of this REVIEW I endeavoured to point out the ground on which, consistently with the authorities, relief from the consequences of mistake of law could be granted. I began with a set of propositions 'applicable as a general working theory' to the case of mistake of law and mistake of fact alike; the essence of which, for the present purpose, was sufficiently stated thus: 'If relief is to be given, it must be given on the ground of want of union of minds; if the parties have agreed upon the law, then, be their view right or wrong, there can be no relief[1].' This, it may be remarked by the way, assumed a simple question, unaffected by fraud, trust, confidence, or the like.

What followed was a special consideration of the meaning of the proposition stated, as applied to the question of mistake of law; that is, what constitutes a union, what a want of union, of minds within the rule. The case of *Hunt* v. *Rousmaniere*, twice before the Supreme Court of the United States, was taken as containing a sufficient indication of the answer. That was a case in which the plaintiff loaned money upon the security of ships; the form of which security coming under discussion, a letter of attorney was advised by counsel as preferable to a mortgage, and executed accordingly. The debtor died before payment; the letter was thereby revoked; and the plaintiff now sought to have the instrument reformed, or a lien decreed in his favour, and failed. I thought, in view of the language of the court, it might be considered that the case decided that 'when a particular course is taken upon deliberation, in preference to another present to the minds of the parties, that action, so far, is final.' 'There was,' I said, 'a choice of ends before the lender, in that both the preferable and the adopted course of action was under consideration; he elected his course; by so doing he bound himself.' Then, after a suggestion concerning the term 'deliberation,' the following was stated as the test to which the question of jurisdiction should be brought: 'Was there a choice of ends open to the complaining party at the time? That is, was a doubt raised in his mind whether the particular word, phrase, term, or instrument was sufficient in law to effectuate the intention, and

[1] Comp. *Irnham* v. *Child*, 1 Bro. C.C. 92; *Townshend* v. *Stangroom*, 6 Ves. 328; *Pullen* v. *Ready*, 2 Atk. 587; *Stockley* v. *Stockley*, 1 Ves. & B. 23, 30; *Hunt* v. *Rousmaniere*, 8 Wheat. 174, 210; S. C., 1 Peters, 1.

nothing more than that? If there was, he was put to a [binding] choice;' if there was not, *contra*.

I thought that sufficiently clear, but it turns out that it was not. Whether others have misunderstood me I know not; but I can hardly think that anyone else has been led as far afield by my language as the editor of the Manitoba Law Journal. In an article on the maxim 'Ignorantia legis,' &c., in the October number of that Journal, the learned editor, taking the same general view as that above expressed, that mistake of law stands upon the same footing as mistake of fact, works out a result partly in harmony with the view presented in my article, and partly not. After stating as my test the general principle deduced from *Hunt* v. *Rousmaniere* ('where a particular course is taken upon deliberation,' &c.), instead of the more specific test actually put by me, the editor says that I have misread *Hunt* v. *Rousmaniere*. The plaintiff, he declares, was unsuccessful, not on the ground 'that a particular course was taken upon deliberation,' &c., 'but upon the ground that the agreement was for a power of attorney, and that there was no agreement at all to give a mortgage.' Very true, the want of any agreement for a mortgage was the reason why the court refused to consider that there was one; a mortgage had 'upon deliberation' been considered not so desirable as a letter of attorney.

It is true also, so far as the dry shell of the decision is concerned, that 'the case does not touch the question whether an agreement made under mistake of law may not be rescinded [who has said it did?], but decides merely this, that the court will not make an agreement for the parties, and then order them to execute it.' But my critic forgets that a case decided by an able court, in a reasoned opinion, has a soul, and means something more to the world, if not to the parties, than the decision of an issue. It is in the reasoning of the court, especially of Chief Justice Marshall, that the instinctiveness of the case is found; what that reasoning teaches cannot, it seems to me, be mistaken.

My learned critic next proposes to try my test; and here it is that he shows how he has failed to understand it. He now supposes a case of the parties having agreed to have a security executed which should be 'a charge upon the vessels,' and then asks, if the execution of a power of attorney upon deliberation, in preference to a mortgage, would be final in such a case. Of course not, and my test should have told the writer so. For in the case put the only question is between the relative advantages and disadvantages of those two instruments. Now one of the two is totally unequal to the purpose agreed (the charge upon the vessels); and this not being known or intimated to the lender, the case falls within the second

part of the test. No 'doubt was raised in' the lender's 'mind whether the particular instrument was sufficient in law to effectuate the intention.'

I am sorry if I did not make it clear that the application of my test turned upon the question whether a doubt was raised concerning the existence of the very law which has created the difficulty. If, without danger of excluding cases, I can make the question clearer by extending it, the test to be applied to ordinary situations is, whether the party complaining was entirely ignorant of the existence of the law[1], the operation of which upon the instrument or transaction would on the one hand entirely cut off and defeat the agreed purpose, or on the other, besides carrying out that purpose, would effect some further result radically different from any contemplated[2]. This, in my view, is the test by which to determine whether the minds of the parties met where it is a case of contract, or whether the act was binding where it is not.

If the test proposed was, whether there had been deliberation upon the instrument or measure adopted, as opposed to another or others before the parties, as my critic appears to understand it, he might have been severe instead of polite, and pronounced it nonsense; for there is always more or less of that in every transaction. Whether it is best to do or not to do the thing proposed is always the question to be decided, and not infrequently, whether to do one or another of several things proposed.

The question in *Hunt* v. *Rousmaniere* was not between one instrument which would effectuate the end desired, and another which was radically insufficient for the purpose, but which of the two instruments would afford the *better* security; each was sufficient for the general purpose, and the question was one of degree. If the parties had agreed that a charge upon the ships should be effected, then it would have been proper for the court to decree, not that a mortgage should be executed, for the parties had decided against a mortgage, but that the power of attorney should be treated as creating a lien upon the property.

My Canadian critic would, according to that part of his article now under consideration, go further, it seems, than my test would permit. If I understand him there correctly, he would have relief granted for mistake of law though there had been deliberation in

[1] 'It is proper to notice at the outset,' I said (p. 301) in my article, 'that if the terms "mistake of law" and "ignorance of law" were always used with strict propriety, it would be found that the cases in which relief is granted are cases of ignorance and not of mistake; which latter term implies some notice and consideration of the law.'

[2] Examples of the latter part of the test may be seen in *Watson* v. *Watson*, 128 Mass. 152; *Cooper* v. *Phibbs*, L. R. 2 H. L. 149. Other considerations were mixed up with the 'mistake' in the much cited case of *Bingham* v. *Bingham*, 1 Ves. Sen. 126; and the case is a doubtful authority at best, 1 Story's Eq. § 24.

respect of the existence of the very law which is the subject of complaint. There is some authority for such a position, as I pointed out in my article[1]; but the current of authority, as I think I showed, is set another way. To the cases cited in the former article, an intimation of Lord Eldon in *Stockley* v. *Stockley*[2], which ought to have been referred to, must be added. That was a case of family agreement entered into under mistake of law, in which Lord Eldon suggested the very distinction upon which my test is founded; a distinction between cases in which a doubt is raised between the parties concerning their rights in law and a settlement made upon the footing of the understanding in regard to it, and cases in which the parties act under mistake of law upon the supposition of a right in one of them, without a doubt raised. In the first of these cases the court would go far in a family matter 'to carry the agreement into execution,' but 'it would be too much to execute an agreement' in the second. And this distinction of Lord Eldon is referred to with approval as a general one by Mr. Justice Story[3].

Even general cases of compromise of doubtful legal rights, concerning which it is well settled that mistake is not a ground of relief, are not wholly irrelevant. It may be doubted whether there is any substantial distinction between such cases and any other in which the parties have resolved a doubt concerning the law, and acted accordingly. If the law looks with favour upon the settlement of disputes, it also looks with disfavour upon attempts to open questions deliberately closed. Mistake of judgment cannot afford ground for relief even where the mistake is of fact, made upon the decision of one of two clear cases and definite courses of action[4]. The doubt having been resolved, the minds of the parties have perfectly met.

But I cannot close without turning critic myself. I have read the article of the editor of the Manitoba Law Journal very carefully, once and again, and I cannot help thinking that he is inconsistent with himself. He rejects my test in the first part of his article, and then later adopts one, as a secondary proposition, which in substance is the same as mine. And though he rejects mine upon a misconception, still his acceptance of it later is out of harmony with what seems to be his earlier position, that mistake of law is ground for relief though made upon deliberation. By way of a general proposition he now says that land conveyed or money paid under mutual mistake either of fact or law may be recovered. Then by way of qualification: 'But if the parties are aware of a doubt as to

[1] *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290, 320; Quarterly Law Review, 306, note 6.

[2] 1 Equity Jur. §§ 129, 130.

[3] 1 Ves. & B. 23, 31.

[4] *Childs* v. *Stoddard*, 130 Mass. 110.

fact or law, and nevertheless make an agreement, they are bound.' And the editor is good enough to tell us, when speaking of *Rogers* v. *Ingham*[1] as falling within this qualification, that 'Mr. Bigelow's test, or something nearly like it, would be applicable here.' Upon the principle that of two inconsistent statements the later, when clear and definite, is to be accepted as the party's real mind, I may conclude happily that my critic is at one with me after all[2].

One other criticism and I have done. The editor of the Manitoba Law Journal has fallen foul of the dangerous terms 'mutual' and 'unilateral' mistake. Speaking of the latter, he says that for mistake of law or of fact 'land and money are recoverable (*a*) if the mistake have been caused by fraud or misrepresentation, (*b*) if the other party was under any obligation to disclose the truth.' *Contra* 'if there have been no obligation to disclose the truth, and no fraud or imposition.' But what difference can it make to the case whether the party against whom the relief is sought was guilty of fraud (or imposition)? If the complaining party never agreed, then, though the mistake was unilateral only, there is no contract. Wrongdoing is not necessary to prevent the meeting of minds[3].

MELVILLE M. BIGELOW.

[1] 3 Ch. D. 351.

[2] *A fortiori* are we in agreement if what I have called the writer's earlier position is not at variance with his later.

[3] *Rider* v. *Powell*, 28 N. Y. 310.

OXFORD, 23 *June*, 1753.

In *Michaelmas* Term next will begin

A

COURSE of LECTURES

ON THE

LAWS of ENGLAND.

By Dr. BLACKSTONE, of *All-Souls* College.

THIS Courſe is calculated not only for the Uſe of ſuch Gentlemen of the Univerſity, as are more immediately deſigned for the Profeſſion of the Common Law; but of ſuch others alſo, as are deſirous to be in ſome Degree acquainted with the Conſtitution and Polity of their own Country.

To this End it is propoſed to lay down a general and comprehenſive Plan of the Laws of *England*; to deduce their Hiſtory; to enforce and illuſtrate their leading Rules and fundamental Principles; and to compare them with the Laws of Nature and of other Nations; without entering into practical Niceties, or the minute Diſtinctions of particular Caſes.

The Courſe will be completed in one Year; and, for greater Convenience, will be divided into four Parts; of which the firſt will begin to be read on *Tueſday* the 6th of *November*, and be continued three Times a Week throughout the Remainder of the Term: And the following Parts will be read in Order, one in each of the three ſucceeding Terms.

Such Gentlemen as propoſe to attend this Courſe (the Expence of which will be ſix Guineas) are deſired to give in their Names to the Reader ſome Time in the Month of *October*.

*** The broadsheet of which the above is a reduced facsimile, and of which I am not aware that another copy has been preserved, was found by me in a recently purchased copy of the now somewhat rare 'Privilegia Universitatis.' It would be interesting to know more of the circumstances which attended the beginnings of the study of the Common Law at Oxford. Blackstone's brother-in-law and biographer, Clitherow, in the preface to the Reports, tells us that the lectures of 1753 'even at their commencement, such were the expectations formed from the acknowledged abilities of the lecturer, were attended by a very crowded class of young men of the first families, characters, and hopes.' In 1758 Blackstone was elected to the newly founded Vinerian Professorship, and Bentham, who had returned to Oxford early in December, 1763, writes as follows: 'I attended with two collegiates of my acquaintance. One was Samuel Parker Coke, a descendant of Lord Coke, a gentleman commoner, who afterwards sat in Parliament, and the other was Dr. Downes. They both took notes, which I attempted to do, but could not continue it, as my thoughts were occupied in reflecting on what I heard. I immediately detected his fallacy respecting natural rights. . . . Blackstone was a formal, precise and affected lecturer, just what you would expect from the character of his writings; cold, reserved, and wary; exhibiting a frigid pride. But his lectures were popular, though the subject did not then excite a wide-spreading interest, and his attendants were not more than from thirty to forty' (Works, x. p. 45). Lord Eldon in the case of *Abernethy* v. *Hutchinson* (1825), 3 L. J. Ch. 209 (for a reference to which I am indebted to the present holder of the Vinerian chair, Professor Dicey), says: 'We used to take notes at his [Blackstone's] lectures. At Sir R. Chambers' lectures also the students used to take notes.' It must however be remarked that Eldon did not matriculate till 15th May, 1766, the year in which Blackstone finally severed his connection with Oxford, after for some time previous lecturing by deputy. He had resumed his London practice in 1759, and in 1761 had entered Parliament and had become a King's Counsel. The Vinerian Professor's statutory right of reading by deputy, upon which Blackstone had successfully insisted in 1761, was very amply conceded to his successor, Sir R. Chambers, who held the office for three years after he had gone out as a judge to India (1774–77). The future Lord Eldon was duly appointed to be his deputy, at a salary of £60 per annum, and as such (according to the story which he told long afterwards), had to read, soon after his elopement with Bessy Surtees, 'with about 140 boys all giggling at the Professor,' a previously unseen lecture, sent to him by Chambers, upon the Statute 4 & 5 Phil. & M. c. 8, *for the punishment of such as shall take away maidens that be inheritors, being within the age of sixteen years, or that marry them, without consent of their parents.* T. E. HOLLAND.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Handbuch des Völkerrechts, auf Grundlage Europäischer Staatspraxis, unter mitwirkung von, &c., herausgegeben von Dr. Franz von Holtzendorff, Professor der Rechte. Erster Band. Einleitung in das Völkerrecht. Berlin: Carl Habel. 1885. 8vo. xii and 523 pp.

Legal science is deeply indebted to Professor von Holtzendorff, not only for the well-known treatises which have proceeded entirely from his own pen, but also for the great works of reference, upon several branches of law, which he has succeeded in producing with the co-operation of the most eminent specialists in Germany[1]. Only by some such organised division of labour does it seem possible to grapple with the enormous mass of modern legal systems.

The 'Handbook of International Law' is a work of this kind, to be completed in four volumes, and to consist of a series of essays, in which Professor von Holtzendorff himself, together with Drs. von Bulmerincq, Caratheodory, Dambach, Gareis, Geffcken, Gessner, Lammasch, Lueder, Meili, Melle, Rivier and Störk, will respectively deal with the topics on which they are acknowledged authorities. Vol. I. contains a theoretical and historical introduction by von Holtzendorff, and a sketch of the post-Grotian literature of the subject by Rivier. The theoretical chapters will be instructive as revealing to an English reader the difference between the conception of International Law with which he is familiar, and that which prevails upon the continent. There is indeed much more to be learnt from these chapters, where one is constantly struck with the wide reading and mature judgment of the author, even if one cannot help regretting that a certain indistinctness of outline has resulted, as it inevitably must result, from an attempt to treat the so-called 'International Private-law,' or 'Private International-law,' as a department of the Law of Nations. In the historical portion of the Introduction, von Holtzendorff has brought together and illustrated with a profusion of learning such anticipations and germs of International Law, properly so-called, as can be found in ancient and mediæval history. The later chapters, e. g. those dealing with the Teutonic races, Commerce, and the Reformation, are more valuable than the earlier ones. The International Law of the Assyrians and Egyptians is, in point of fact, a negative quantity.

Professor Rivier, after devoting a few pages to the forerunners of Grotius, gives a pretty full account of the life and writings of the great jurist who has had the good fortune to be commonly spoken of as the founder of International Law. Subsequent chapters deal with the Englishmen of the seventeenth and eighteenth centuries, with the writers on 'natural law,'

[1] Handbuch des deutschen Strafrechts, in four vols.; Handbuch des deutschen Strafprozessrechts, in two vols.; Materialen der deutschen Reichsverfassung, in three vols.; Encyclopädie der Rechtswissenschaft, in five vols. For a review of the fourth edition of the last mentioned work, see L. Q. R. i. p. 62.

with Wolff and his school, with the 'positive' school, with Kant and subsequent philosophers, and with the later 'eclectic positivism.' Few persons could have given so much reliable biographical and bibliographical information bearing upon the history of International Law, in little more than a hundred pages. But Professor Rivier is a master in this department of knowledge.

The remaining volumes of the 'Handbuch' (which is, by the by, to appear in French as well as in German) will deal with States, Treaties, Embassy, War and Neutrality. T. E. H.

The Commentaries of Gaius and Rules of Ulpian. Translated with Notes. Third Edition, by BRYAN WALKER, M.A., LL.D. Cambridge: University Press. 1885. 8vo. xxvi and 501 pp.

THE chief if not the only value of this book lies in its text. That of Ulpian is Huschke's (1861), with occasional variations (where the Vatican MS. is defective or unintelligible) from Cujas, Schilling, and Böcking. That of Gaius is based upon Krüger and Studemund's edition of 1877, though it would have been well for the editor to have collated that of 1884, in the preface to which Studemund says 'acriter intenta oculorum acie nonnullorum locorum desperatorum lectionem nuperrime perficere potui, in aliis id certe discernere potui, utrum id quod aut a nobis aut ab aliis viris doctis divinando conjectum esset in codice extare potuerit necne.' In all cases however where the MS. (as known to Dr. Walker by the apograph of 1874) was lacking, he gives the authority for the reading which he adopts, so that the student is able to judge whether he is reading Gaius himself, or merely the conjectures of Huschke, Heffter, or others.

The preface or introduction contains little that is new or striking, except some rather dogmatic theorising as to Gaius and the character of his work. We are bidden remember that Gaius was 'only a private lecturer,' and his book 'a republication in a collected form of lectures:' and it is suggested that the esteem in which it was held was due to the fulness with which it treats of the 'anomalous relations of the *jus civile* and the *jus gentium*,' and of the legal position of Latins and *peregrini*, with whose litigation the Roman Courts were much engaged. But these views are based largely upon the Roman history of Dean Merivale, who is not a recent writer: Mr. Roby, a much later and more trustworthy authority, knows nothing of some of them, and considers that no statements upon this whole subject can take a higher rank than speculative opinions in general.

The notes are extremely scanty, and by no means perfectly accurate; indeed, for his own sake it may be hoped that Dr. Walker's prophecy, that in the present edition the book has 'probably taken its final form,' may not be fulfilled. The following are some of the mistakes which have been detected in a very hasty survey of the commentary. The note on *conventus* (Gaius i. 20) is very misleading. The word there means a session of the provincial governor's court, much the same as our modern 'assize.' The best philologists (e.g. Professor Nettleship) have, it is believed, given up the derivation of *auctoritas* from *augeo* (p. 67). The note on *nexum* and *nexus* (p. 84) might well have referred to Professor Nettleship's paper on those terms in the Journal of Philology. *Legitimo jure* (p. 86) means the agnate entitled on intestacy: the note would make it include *sui heredes*, to whom the passage clearly does not refer. On p. 90 it is said that a 'res vi possessa' could not be acquired by usucapio for lack of 'justa causa:' a mistake the more surprising because the true reason is given in the text.

The rationale of 'usureceptio ex fiducia' is entirely misunderstood in the note on Gaius ii. 59. On p. 104 the 'actio mutui' is a figment of the editor's for 'condictio certi.' On p. 212 we are told that 'no obligation was recognised by the law unless it could be enforced by action:' and yet p. 467 shows that Dr. Walker knew of the existence of *obligationes naturales*. Novation is a fruitful source of misconception. The real object of 'expensilatio' as a mode of novation is quite wrongly described on p. 231; seventeen pages later, and also on p. 474, we learn that it could not be used for that purpose at all, while on p. 330 novation as a method by which obligations were extinguished *ipso jure* is entirely ignored. On p. 263 the theory of 'culpa' is erroneously stated, probably from a desire to expound a difficult subject in the compass of six or eight lines of ordinary print. The longer notes in the Appendix are no less open to criticism. On p. 449 *dediticii* are said to have been Romans. Six pages later, in the Table of modes of Acquisition, Tradition is said to be (1) on sale, (2) on gift, (3) on loan. Why the editor stopped here, and did not make as many different kinds of *Traditio* as there are 'causae traditionis' does not appear. On p. 468 we are told that to verbal and literal contracts 'ought to be added *nexum*, a contract solemnized *per aes et libram*, of which little mention is made by Gaius, its employment being in his day almost a thing of the past.' Most people believe that it had quite become a thing of the past centuries before Gaius lived, and we must humbly confess that we do not know the passages of that writer in which even that 'little mention' *is* made of this contract. Page 469 is full of blunders; it states that *quod jussu* would lie against the appointer of a free agent (by which we suppose is meant an 'extranea persona'): that *hypotheca* is a real, and *superficies* a consensual contract: and that Gaius did not know what he was about when he treated *mandatum* as consensual. In the note in the Appendix on the dissolution of obligations there is no mention of 'datio in solutum,' though it is discussed by Gaius (iii. 168) and Justinian (Inst. iii. 29 pr.).

The translation appears to be accurate, but the language used can hardly be said to be English. The following are examples:—

'Other tutelages, styled fiduciary, have been admitted into use upon the precedent of patronal tutelages' (Gaius, i. 166). 'The case is different with those entries which are called "arcarian," for in these the obligation is one *re*, not *litteris*' (Ib. iii. 166).

It may be observed, in conclusion, that throughout the notes Austin is cited and referred to as an authority on Roman Law. Those who are acquainted with Austin and with Roman Law will probably regret that, if Dr. Walker thought it necessary to refer to English works on the latter subject, he did not select some more modern writer. J. B. M.

Succession in den Besitz nach Römischen und heutigem Recht. By Dr. Emil Strohal, Professor of Law at Graz. Graz, 1885. Large 8vo. 236 pp.

Dissatisfied with the attempts of Brinz and Ihering to deal with the problem of derivative possession, the author of this monograph here unfolds a theory of his own upon the matter; and though we may regret the addition of further literature upon a topic on which so much has already been said, it must be confessed that Dr. Strohal writes with force and judgment, and possesses a thorough and critical knowledge of the authorities. The style of his treatise is severe, and the argument so sustained as to be followed only by the closest attention: hence it is probable that ordinary

students will find most to interest them in the first chapter, in which the author gives an account of the attitude taken towards his particular problem by the earlier civilians and the continental codes of the end of the eighteenth and the beginning of the nineteenth centuries.

Speaking briefly, Dr. Strohal's task is to refute some of the leading principles on the subject of possession put forward by Savigny in his 'Recht des Besitzes:' for though the proposition which he is mainly concerned to prove is merely that the Roman Law recognised derivative possession, yet in proving this he falls foul of positions which are vital to Savigny's general doctrine, and whose incorrectness therefore he feels constrained to demonstrate. Nor are these views peculiar to Savigny. Substantially they have been accepted by the majority of the more recent authoritative writers on the topic, including Bruns, Vangerow, Arndts and Windscheid.

That one person could succeed another in possession, so that the latter is continuous and unbroken, Savigny could not admit. He taught that according to Roman doctrine possession was a 'factum:' that there could be no succession except to legal rights, and consequently that between the acquisition of possession by unilateral act (as in occupation) and by delivery there is no substantial difference ('Recht des Besitzes,' 7th ed., p. 240): in both cases there must be a corporeal act (apprehension) capable of giving the actor the actual control of the thing. It is in this that (in his view) the true nature of possession consists—the present control of the thing, coupled with the capacity of excluding all other persons from interference:—and to this, it is admitted, there can be no succession. But Dr. Strohal's point is that by 'possessio' the Romans mean 'jus possessionis'—'nicht den Besitzthatbestand, sondern die aus dem Dasein des letzteren resultierende rechtliche Stellung' (p. 49): and the impossibility of accounting on Savigny's hypothesis for many decisions of the Roman jurists is well shown in the course of pp. 54–71. Dr. Strohal's own determination of 'Apprehensio' and 'Besitzthatbestand' are on pp. 71 and 126 respectively: and the incidents annexed by law to the latter are enumerated on pp. 133 sqq. His own general view on the nature of possession (the merit of which is that it renders possible the fact of succession) is compared with that of Savigny on p. 157.

The fourth and last chapter deals with the individual cases of succession, those of succession 'per universitatem' being reserved for the end. As Dr. Strohal observes on p. 6, the Roman Law held that possession pure and simple could not pass from a deceased person to his heir (Dig. 41. 2. 23 pr.), though some passages suggest that there were exceptions to the rule, which did not apply to universal succession in general, for the adrogator succeeded to the possession of the adrogatus (Dig. 43. 26. 16). The explanation of this seeming anomaly, and the identification of the exceptions, are based upon Studemund's careful decipherment of the MS. of Gaius (ii. 58, iii. 201). Where there was any interval between a man's death and the succession of his heir (i.e. in all cases of 'hereditas jacens') such succession in possession was held impossible; but where the heir was 'necessarius,' he succeeded *ipso jure* to the deceased's possession, with all its legal incidents.

It can hardly be expected that Dr. Strohal's treatise will at once compel the 'surrender' of Savigny's followers to which he hopefully alludes, for they have already stood a severe bombardment from men whose names are better known. But it deserves a perusal if only for its very clear statement of the weak points in the older theory, and also because it is an excellent example of a style of legal thinking and writing common on the Continent and (in a less degree) in America, though sadly lacking in our own country.

J. B. M.

A Selection of Cases on the English Law of Contract, Part I. By Gerard Brown Finch, Law Lecturer and late Fellow of Queen's College, Cambridge. Prepared as a text-book for Law Students in the University. Cambridge: University Press. 1885. La. 8vo. 404 pp.

In the *Selection of Cases on the English Law of Contract*, Mr. Finch has provided the complement to the sound general doctrine laid down in his address, and has prevented any possibility of his giving rise by his commendation of legal theory to the mistaken notion that the study of law means the picking up of a few abstract principles about the nature of sovereignty, the relation between law and custom, the distinction between rights *in rem* and rights *in personam* and the like. This sort of knowledge is good in its way; it is of real value to an intelligent lawyer, and has its proper place in a complete course of legal education. But knowledge of abstract jurisprudence is not in itself knowledge of law, still less is it knowledge of the law of England. To master the rules of English law you must study these rules as applied to the affairs of life. They are maxims which derive their whole real force from their application to cases. As Paulus excellently said of Roman law, confuting by anticipation the pretentious and shallow writers who fancy that Roman lawyers were less practical than English ones, 'non ex regula ius sumatur, sed ex iure quod est regula fiat.' Judicial decisions are legal experiments; reports are the record of such experiments, our evidences of 'ius quod est.' The lawyer or student who really enters into the results of a line of leading cases learns much more than a few verbal maxims which may be committed to memory. He sees what is the true meaning of legal doctrines when applied to fact; he 'becomes,' as Mr. Finch well expresses it, 'familiar with the tone of thought, the attitude of mind, which prevail in our Courts, he gets a touch of the Genius of English law; I might venture to add, of the English race.' He learns in short, by the only method in which it can be learned, the notion of justice which the lawyers and judges of England have developed by labours extending over centuries, and have impressed upon the minds of the English people. There are, we admit, some practical difficulties in basing legal education on what might be fairly called the method of Professor Langdell. These difficulties spring mainly from the distaste of English students for oral discussion; this obstacle may, however, be overcome and certainly no greater service can be rendered to the teachers or students of law than the carrying out by a lawyer as competent as Mr. Finch of a scheme of tuition based on the examination of cases. For those who have not the advantage of Mr. Finch's own instruction, his *Selection of Cases* is an invaluable guide towards the best method of legal study. A. V. D.

American Constitutions; the Relations of the Three Departments as adjusted by a century. By Horace Davis, San Francisco, California. Baltimore: Johns Hopkins University Series. 1885.

Mr. Horace Davis's *American Constitutions* reaches England at a most appropriate time. Englishmen of all classes are becoming aware that whether for bad or good the English constitution is being rapidly developed in a democratic direction, and English thinkers have under the guidance of Sir H. S. Maine at last opened their eyes to the fact that the Constitution of the United States shows the actual working of the methods by which the

rising flood of democracy may best be guided into safe channels. His *Popular Government* is far too interesting and suggestive a work to be passed over with a mere allusion; it presents a legal as well as a political side, and will hereafter be noticed in this Review with something like the fulness which so admirable a treatise deserves. Meanwhile the last chapter of the book which treats of the Constitution of the United States may be cited as a conclusive proof of the interest with which Englishmen now welcome all information about the greatest of the States bounded by the English people and of the certainty that many thinkers will study Mr. Davis's work both with care and with sympathy. From a careful perusal of his pages almost every English theorist will carry away new ideas as to American Constitutionalism.

It is impossible, in the first place, to read the *American Constitutions* without perceiving that, as has been already pointed out by that most acute of French writers M. Boutmy, critics of American Democracy have not paid due attention to the constitutions of the separate States. And we doubt whether even Sir Henry Maine has given prominence enough to the extent to which the character of American Democracy is modified by federal institutions, and still more by federal sentiment.

Mr. Davis again makes plain as day that American constitutionalism has during the course of a century undergone greater changes than are apparent to cursory observation. The constitutions of the different States have in many cases been changed again and again, and the relation between the three departments of government—the Executive, the Legislature, and the Judiciary—has been gradually re-adjusted both in the particular States and throughout the Union.

It is, lastly, established by Mr. Davis, that the process of alteration or adjustment obeys certain permanent tendencies or laws. The 'modern spirit,' he writes, 'shows itself everywhere by separating the functions of the three departments and making each independent of the other as far as it can be done. It is distinguished everywhere by a restriction of the Legislature, an increase of executive power, and by independence of both Governor and Judges.' Independence apparently means in this sentence independence of the legislature, for the popular election of judges can hardly be alleged to increase the 'independence of the Bench,' in the sense in which that term is used in England. Readers should however note that Mr. Davis certainly maintains that judicial authority has during the last century increased under the Constitution, both of the United States and of the separate States. 'The Courts,' he writes, 'have increased steadily in power and independence .... This steady growth of the authority of the Judiciary is, to my mind, the most remarkable and unique feature in the history of our system of government.' He adds further, the more certainly true and very noteworthy remark, that the power to declare a law unconstitutional is much 'broadened' by the modern tendency to limit legislation. 'The early constitutions were very brief, containing usually a little more than a Bill of Rights and a skeleton of the government, leaving all details to the discretion of the legislature. Now all this is changed, the bounds of the different departments are carefully defined and the power of the legislature is jealously curbed, particularly in the domain of special legislation. It will be seen at a glance that this enlarges the relative power of the Courts. It limits the legislature and widens the field of the judiciary at one stroke.' These sentences will certainly arrest the attention of anyone accustomed to the comparative study of constitutional law, for they suggest the reflection that democracy in America has run an exactly opposite course to the road

pursued by democracy in France. In America each change in the constitution, whether of a State or the Union, has in general tended to increase the number of immutable or fundamental laws. The feature which distinguishes the existing French Republic from each of the earlier Republican constitutions is the very limited scope of the few immutable rules which it contains. In America, the progress of democracy increases the rigidity of a constitution: in France, democratic progress has come near to producing a constitution as flexible as that of England. This fact, together with a score of other facts, noted by Mr. Davis, makes a critic feel that general statements about the character of modern democracy ought to be based on a very careful and wide comparison of a large mass of data. We do not pretend to agree with all Mr. Davis's inferences from the development of American constitutionalism, but we confidently assert that a study of his pamphlet will greatly aid anyone who wishes to draw just conclusions either as to the true character of the changes which American constitutions have undergone, or as to the inferences which these alterations warrant with regard to the future of European democracy. A. V. D.

Questions de droit maritime. 3ème Série. Par Alfred de Courcy. Paris: F. Pichon. 1885.

M. de Courcy's views on questions of maritime law are always worth considering, even when he ventures beyond the boundaries of the French Codes. In the present volume the author discusses among other questions the shipowner's liability for negligence on the part of his servants, with special reference to the question as under consideration in England.

The French common law holds the employer liable for the acts of his agent as in England, but it makes an exception in favour of the shipowner. Article 216 of the Code de Commerce states as follows both the principle and the exception: 'The owner of a vessel is responsible for the acts of the master, and bound, as regards the engagements entered into by the latter, in whatever relates to the vessel and the voyage. He can in all cases free himself from the above obligations by the abandonment of the vessel and the freight.' In other words, the shipowner's liability is limited to the amount at stake, viz. to the ship itself. If the ship sinks, of course there is no remedy. The object of this enormous exception to the universal principle that a man shall repair the injury done by his agent is to save shipowners from consequences which would render him liable for everything short of perfection on board his ship.

In England, on the contrary, the old principle subsisted until tempered with the restrictions introduced by the Acts of 1854 and 1862. M. de Courcy says he has always been astonished that English shipping could prosper as it did under this 'prodigious threat of liability,' and that the shipowners should not long before have compelled Parliament to grant them protection analogous to that accorded by Art. 216 of the Code de Commerce.

The Act of 1862 (s. 54) provides that in respect of loss or damage to ships, goods, merchandise, or other things, shipowners are not liable to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage, where such loss or damage arises without their actual fault or privity.

M. de Courcy knows few legislative enactments as devoid of common sense and justice as the Act of 1862. It responds neither to any principle of law or equity, nor to any practical exigencies. It is merely an arbitrary expedient which, for instance, saddles the proprietors of large sailing vessels

with a liability out of all proportion to that which it imposes on the owners of small expensive vessels, such as pleasure-yachts.

The author dwells at some length on the untoward consequences of the conflict of laws which thus arises. In cases of collision it gives the parties remedies which differ completely according to the jurisdiction within which the one or the other party succeeds in getting judgment.

M. de Courcy recommends English legislators to adopt the principle of limiting the liability to the ship itself. At the same time he would not recommend the adoption of the French Act of 1841, which makes the ship the limit of liability not only for the *acts* but also for the *contracts* of the captain. He would restrict the limitation of liability to the *acts* of the captain and crew.

The other essays contained in this volume, viz. 'Salvage and Aid,' 'State Subsidies to Merchant Shipping,' 'A Strange Doctrine on General Average,' 'The Influence of the Telegraph on Maritime Law,' &c., are all instructive, though of less practical interest to Englishmen. T. B.

The Devonshire Domesday. [Edited by a Committee of the Devonshire Association for the advancement of Science, Literature and Art.] Parts I. and II. Plymouth. 1885. 8vo. 285 pp.

This is an excellent piece of work, and we trust that steps will be taken to make it accessible to scholars throughout England. It gives us in a convenient form the texts of the Exeter and Exchequer Domesday on opposite pages, extended and furnished with a translation. Notes and indices are promised when the printing of the text is completed. But the constant juxtaposition of the two texts, and the removal of all mechanical trouble in reading and comparing them, is already of great use. The folio edition of Domesday, besides being available to most students only in public or corporate libraries, is a book to refer to, not to read. And to get the benefit of Domesday one ought to read as well as refer. What can be more eloquent of the mediæval way of regarding land than the constant abbreviation of 'valet per annum' in the Exeter text to a simple 'valet' in the greater Domesday? It did not seem even possible to an Anglo-Norman clerk that 'valet' as applied to land should be taken for anything but annual value. Chattels had a saleable and capital value; land (notwithstanding the peculiar privileges of bookland before the Conquest) was still hardly brought under that conception. Again when we see on page after page 'nescitur quot hidae sunt ibi quia nunquam geldavit,' that brief statement is more forcible than any amount of dissertation to convince us that Mr. Eyton found the true key to a standing puzzle when he pronounced the hide to be an unit not of actual area but of taxable value. Again the frequency with which a virgate (a quarter of the hide, treated in the same way as a conventional unit) is parcelled out between demesne and tenants' land catches the eye, and gets noted, far more readily than in using the folio edition.

The extension and translation are correct and scholarly, though purists may desiderate some indication of ambiguous contractions, e.g. where the extended inflexion may be either *carucis* or *carucarum*, or the noun itself may be either *caruca* or *carucata*. And we think *servus* would be better rendered 'bondsman' than 'serf.' English law knows nothing of serfs, but 'bondsman' is an authorized term to mark the difference between the *servus* or *nativus* and the *liber homo tenens in villenagio*.

We hope that this good example may become widely known, and if possible

followed in other counties. Probably no county wants at least two or three scholars of leisure and competence for such an undertaking. Even without uniformity of plan the thing would be worth doing. With it, we should ultimately have a new and great national monument of private enterprise. Meanwhile we take this occasion to note another local undertaking in the right direction—Mr. A. N. Palmer's 'History of Ancient Tenures of Land in the Marches of North Wales,' published at Wrexham, and containing many curious data about customary nomenclature and measurements. But we must not be tempted to pursue the subject.

F. P.

The Case of the Educated Unemployed. By WILLIAM HENRY RAWLE. Second Edition. Boston, Mass.: Little, Brown & Co. London: Sampson Low & Co. 1885. 4to. 31 pp.

THIS is a scholarly little tract, in its origin an address to a meeting of the Phi Beta Kappa Society at Harvard, and worthy of its audience. In substance it is a plea for the humanities as part of a professional education, even from the strictly practical point of view. But this means the humanities taken seriously. Humanities—or any other kind of knowledge—defeat their own purpose if taken as cram. 'Any one may get through his classics using a crib instead of his grammar and dictionary, he may perhaps even get through with credit, he may cram for his examinations and be glib at functions and quaternions, but what he thus learns will take no hold upon him, and like money easily got, it easily goes. It is the mental discipline acquired in the course of certain studies which produces what is known as the trained mind—which toughens the mental fibre, which develops concentration of thought into intellectual habit, and enables a man in after-life to do his work, of whatever kind, more easily, more thoroughly, and with less mental strain and friction.' These words are most true, and most worthy to be laid to heart. Mr. Rawle in no wise underrates the conditions of modern competition which have led to the overstocking, as it is called, of the learned professions. On the contrary, he expounds them with merciless detail and lucidity. They exist as fully in the United States as in England. The race is to the swift and the battle to the strong. What is the remedy? You must learn to be swift and strong. There is no shorter way, and there are no backstairs to that way: in other words, the true student shall not put his trust in examinations and 'tips.' It may be a hard counsel: but, as Spinoza saith, 'omnia praeclara tam difficilia quam rara sunt.'

Mr. Rawle mentions incidentally the so-called 'practical' superstition that prevailed in his youth, 'when both mind and body were curiously dealt with, when to handle a foil, an oar, or a cricket bat met with grave head-shakes.' The men of the Inns of Court have not the means, in their quasi-corporate capacity at least, of handling the oar or the cricket bat. But the Inns of Court Volunteers possess a School of Arms which is growing and thriving apace: and if Mr. Rawle will send us a few able-bodied apprentices of the law from Philadelphia or elsewhere, we will undertake to find them companions who, without any prejudice to book-learning, will be ready to cross a foil or single-stick with them, or even to discuss the high, grave, and dubious question—not inferior for subtilty and consequence to any in the whole field of real property—what is the essential difference between a *coup d'arrêt* and a *coup de temps*, and whether the latter is under any and what circumstances justifiable: and that with the approval and auspices of Masters of the Bench and sages of the law.

F. P.

Traité de droit commercial maritime. Par ARTHUR DESJARDINS, avocat-général à la Cour de Cassation. Paris: Pedone-Lauriel. 1885. 5 vols.

FIVE volumes of this masterly work have appeared. Vol. V, which bears the date of 1886, has just been published.

M. Desjardins has not confined himself to a commentary on the text of the Codes and the decisions of the Courts as French authors on the law of merchant shipping have hitherto been in the habit of doing. Nor is his work a mere text-book for the lads at the *École de droit*, or a 'vulgarisation' of the law for the guidance of the merchant lawyers of the Tribunal of Commerce. It is rather a repertory of thought and information for those who have to deal with those more intricate questions which, never seriously treated in the Commercial Courts, invariably find their way to the Higher Courts. In France the interpretation of the Codes has somewhat suffered from the want of a full comparative work dealing with the fine points that thus arise, a want which the present work fills. The author as Advocate-General of the Court of Cassation has had much experience of the difficulties met with, and no man was better fitted for the authorship of a work on a subject which of all others requires to be treated with breadth of vision.

The course followed by M. Desjardins seems to be first to trace the existing provisions of French law from their origin, then to analyse the interpretation of them in the decisions of the Courts and criticise these decisions, which in France have no binding force, and on which, therefore, the criticism of the scholar can be brought to bear with fruit. He does not fail to scrutinise closely the views of other authors, and he concludes his chapter with a concise statement of the corresponding laws of other countries and reflexions here and there of a comparative character where the case suggests their utility.

The first volume, which appeared in 1878, deals with the nationality and status of the ship, the acquisition and transfer of the property therein, and the important subject of maritime liens; the second, published in 1880, treats of the shipowner and captain; the third, dated 1882, of the crew, the charter-party and passengers; and the fourth, issued last year (1885), of the bill of lading and average.

The last volume, just published, dated 1886, treats of mortgages and of the two generally interesting subjects of collisions and contracts by bottomry.

By a coincidence these two branches of maritime law, more perhaps than any others, have been affected by the recent material progress of mankind, and the first is in turn affecting maritime law generally. Before the time of steam navigation, telegraphs and railways, the bottomry bond played a part in the risks of a voyage, which it is far from playing at the present day, whereas collisions, of which Valin wrote (Vol. II, p. 178). 'Les abordages en route sont fort rares; ceux en rades le sont moins; mais au port ils sont assez communs pour la quantité de navires qui abordent au quai ou qui le quittent,' have increased enormously 'en route.' Steamers follow in the teeth of the wind much more precisely marked routes than sailing vessels were wont or able to do, and in the narrower areas of these routes they cross and overtake each other in a way unknown to our forefathers. The result has been the development of an almost new subject among those relating to the Law of Merchant Shipping, viz. that of lights

and signals; the limitation of liability for accidents which shipowners now insert in bills of lading also springs from this source; new provisions as to the rule of the road have become a necessity and are now under consideration for international arrangement.

Nevertheless the questions arising out of the contract by bottomry are on the whole more interesting to lawyers, and are still important.

The essence of the bottomry loan is the maritime risk to which the things on which the loan is contracted are exposed, for by that contract the lender has assumed them for a certain price, says Pothier. As the lender sustains the risk of the voyage, he receives, upon its successful termination, a greater price or premium for his money than in ordinary cases. In French, as in English law, the loan can only be effected on what is in danger of perishing by maritime risk. The former, moreover, requires that the loan shall be for a sum not exceeding the value of the things on which it is effected. In case of the fraudulent exaggeration of the value, the contract is null and void. If no fraud is proved the contract is valid, but only up to the real value. The Spanish Code indeed goes the length of forbidding the captain to borrow on more than three-fourths of the value. The *guidon de la mer* made the bare fact of borrowing more than the value a presumption of fraud. This was also taught by Casaregis and Emérigon, but Valin and Pothier on the contrary held that there should be 'clear and manifest' proof of fraud, and this is the view which the framers of the French Code had the wisdom to adopt. An interesting point is the contribution by the lender to general average. Article 330 of the French Code of Commerce provides that the lender on bottomry shall contribute to general average, and that he shall also contribute to particular average unless he stipulates to the contrary. M. Desjardins points out in answer to M. de Courcy that the wording of this article *a contrario* forbids the stipulation of non-liability to contribute to general average. The article confirmed the view entertained by Valin, which was that to allow the lender to stipulate that he would not be bound for general average was contrary to the nature of the contract on bottomry. The German Code has broken with the old tradition. The lender contributes neither to general nor to particular average. It adds, however, that if the objects devoted to the loan have become in consequence of general or particular average insufficient to reimburse the lender, he bears the loss resulting therefrom. The new Belgian Code has made a step in the same direction. Article 167 provides that the lender shall not contribute to particular average of the objects on which the loan is made, and he may contract himself out of liability for general average. The new Italian Code, on the contrary, though it has borrowed so much from the German Code, has continued a votary of Valin's theory by adding to the French text that any contract negativing liability for general average is null and void. Even in America and England (our own law is in favour of the more liberal view) the Courts are not agreed on this point, which is one on which a uniform rule would be useful. At the Antwerp Congress the resolution adopted was that the lender should contribute to general average unless the contrary were stipulated. We should gather from M. Desjardins' remarks that he would approve of this being the solution in the event of an alteration in French law being made.

The foregoing will afford a slight idea of the contents of these valuable volumes, which every jurist dealing with the law of merchant shipping ought to possess.

T. B.

Principles of the Law of Torts. By Francis Taylor Piggott. London: Clowes & Sons. 1885. 8vo. xxxiv and 416 pp.

We should not be surprised if (success being measured by the sale of copies) this book were successful, and some success it will deserve, for relatively it is a good book, much better than some to which law students too often go for their first notions of the Law of Torts. It is arranged according to a plan which if not the best is at least intelligible, and some parts of this plan are well executed. Mr. Piggott is, we think, at his best when dealing with the middle axioms of the law, at his worst when stating and discussing the most general principles. His treatment of these latter, though there is a noticeable display of logical form, is somewhat vague and bewildering. Thus he is not content to put off his reader with the orthodox definition of a tort, namely, a wrong independent of contract, but attempts to show by means of what he calls (p. 7) 'an exhaustive outline of civil liabilities' what is the field which a definition of tort must cover. This is a laudable attempt, for a beginner may well want to know what a tort is, not merely what it is not, and it should be possible to give him a rational answer. To Mr. Piggott's credit be it said that he does not shirk difficulties when he sees that they exist. Still, we cannot say that his discussion of this matter is really clear. Enough is said to perplex the student, not enough to set him in a right way of thinking. And so with the first principles of civil liability:—the questions which Mr. Justice Holmes has sharply raised and ably handled become blurred in Mr. Piggott's hands. He has read Holmes on the Common Law, and therefore his treatment of responsibility for unforeseen consequences should have been more thorough and definite than it is. To us it seems that he states inconsistent theories without seeing that they are inconsistent. Nor are we satisfied with what he has to say about causation. Doubtless it is a difficult topic, but Mr. Piggott will not make it easier by talk about *causa causans*.

Again, he has sometimes ignored a valuable modern exposition of the law and given what already is, or may soon turn out to be, an antiquated doctrine. As an example we take his treatment of that 'malice in fact' which the plaintiff in a libel case must prove when the defamatory imputation was published on an occasion of 'qualified privilege.' Certainly there is authority both recent and good for saying that malice here means a bad motive, not necessarily spite, but some 'indirect or improper motive.' It is well to say this; but it would be well to add that there is high authority for the contention that the requisite actual malice is not a motive at all. Mr. Justice Stephen has argued for this in more than one well-known book. What is more, Lord Blackburn speaking in the House of Lords and dealing with the most important libel case of our day (*Capital and Counties Bank* v. *Henty*, 7 Ap. Cas. at p. 787) carefully chose to explain this malice in a form of words which made no reference to motive. It is then matter for surprise that Mr. Piggott should not give as at least plausible a definition delivered in our highest court and delivered by Lord Blackburn. Does he not venerate the House of Lords? We shall not take him to task for having cited too few cases. Such a book as his should not be loaded with references to obsolete or insignificant decisions; but cases taken before the House of Lords are not only the most authoritative, they are also apt to be the most instructive even for beginners; they do not go thither unless there is much to be said on both sides, and when there they are very fully debated. If asked, for

example, to name some cases which bring out clearly the legal notion of Negligence we should have mentioned among the very first *Jackson's case* (3 Ap. Cas. 193) and *Slattery's case* (3 Ap. Cas. 1155). We have looked in vain through Mr. Piggott's book for a word about these. Such omissions must seriously lessen the value of the work as a guide for practitioners; but also, and it is on this that we would more particularly insist, the student is thereby deprived of the most luminous illustrations. A case which sets court against court and one law lord against another, is generally a case which lets in light upon the very elements of the law. We have been finding fault, but this because the book is worth taking seriously, one which with all its faults may profitably be read, though by no means so good a book as Mr. Bigelow's useful and unpretentious Elements.

The Influence of the Roman Law on the Law of England, being the Yorke Prize Essay of the University of Cambridge for the year 1884. By Thomas Edward Scrutton. Cambridge University Press. 1885. xvi and 195 pp.

This seems to us a very good essay, legal work of just the kind that a learned university should promote by its prizes. It is hardly to be expected that within seven years from his first degree a man will have made many important discoveries in the field of legal history, and Mr. Scrutton has not and does not claim to have found much that is new; but he has collected and well arranged much valuable material that has hitherto lain scattered about in divers books ancient and modern, some of which are not very accessible. He has written what we believe to be the best essay on this subject, and we do not mean to make this praise trifling by adding that it is the only book known to us which deals with that subject as a whole. It will be a useful guide to the authorities for any who are investigating the history of our law, while the author's own opinions are for the most part sound and sober, and are clearly and modestly stated. In these days it is no small thing for any one dealing with early law to be sober and modest, for the subject is apt to tempt writers into extravagant dogmatism. The part of this essay which seems to us the least satisfactory is that which treats of the period before the Norman Conquest. Little can be done with this period save by one who knows his Anglo-Saxon laws and charters at first hand. Still in these pages a beginner may make a profitable first acquaintance with some of the controversial questions raised by the ingenuity of Mr. Coote and Mr. Seebohm. A little too much reliance is placed on the Harvard Essays on Anglo-Saxon law, and perhaps Mr. Finlason is taken a little too seriously, but on the whole we have a rational and prudent prologue to the main and best part of the book, the careful discussion of Bracton's Romanism. Here Mr. Scrutton has had a good leader in Dr. Güterbock, but he has been at pains to collate Azo with Bracton, and this to good effect. Bracton's text gains quite a new meaning when one reads it with Azo at one's elbow; the picking and choosing, the modifications and misunderstandings let in light upon much that otherwise must be very dark to us moderns. A good text of Bracton must some day be printed opposite to a good text of Azo; then we shall begin to understand many things not now understood. As to the later history of Roman law in England, Mr. Scrutton has some good chapters. More might have been said of the subtle influence that foreign and mainly Roman jurisprudence has had of quite late years, but this, because of its very subtlety, is

not easily to be defined or illustrated. We should have been glad had Mr. Scrutton more pointedly raised the question why it was that Roman law ceased to be attractive to English lawyers just when it was beginning to take hold of Northern France and Germany. Bracton's notion that 'fere in omnibus regionibus' men obey the written law, while England alone makes use of unwritten law and custom, was a hasty generalisation which has done, and repeated at tenth-hand still does, considerable harm. Bracton's own book will indeed seem Roman or Romanesque if we set it beside the almost contemporary Sachsenspiegel, or the treatise of Philip Beaumanoir. German law was very German: the 'reception' of Roman law in the greater part of Germany is an event comparatively recent. Why was there no such reception in England? Mainly, as we think, because at a very early time we came by an active and powerful Parliament, and at a still earlier by a very concentrated system of judicature. Some day Mr. Scrutton, not content with an academic success, may deal thoroughly with this matter. It is of great interest, and he has already many qualifications for the task.

A Treatise on the Law relating to the Carriage of Goods by Sea. By T. G. Carver, Barrister-at-Law. London: Stevens & Sons. 1885. Large 8vo. lx and 784 pp.

This is a sound and practical treatise on a branch of law which is of great importance, not only to English but also to colonial lawyers. The work is divided into three parts, namely, Part I. The Contract, Part II. The Voyage, and Part III. The Delivery. But the division is somewhat arbitrary and useless, because we find the second chapter of Part II. deals with the loading,—the first chapter of Part III. with the discharge, which is as much a part of the voyage as the loading. Such formalities as these are better omitted. We think that we have with reasonable accuracy described this book as 'sound and practical,' for that seems to be its character. We find no remarkable grasp of the subject in it, nor any special power either of logical arrangement or clearness of definition. Thus on p. 499 we find this rather slipshod definition of stoppage in transitu,—'where the property has passed, and the vendor has shipped the goods, and has parted with the bill of lading and lost his lien for the price, he still, if he remains unpaid, has the right to regain possession of the goods while they are in transit, in the event of the buyer becoming insolvent. This is called the right of stoppage in transitu, and it is exercised by giving notice of the claim to those who have custody of the goods, before the transit comes to an end.' Compare this with the definition of Lord Justice Cotton in *Phelps, Stokes, and Co.* v. *Comber*, L. R., 29 Ch. D. 813 (821), and the difference between the two will be very clear. This case, too, though decided in May, 1885, does not appear in this work: it is true it only found its way into the Law Reports in September, but the work did not appear till October. But to return. The chapter in which this definition appears is headed 'Stoppage in Transitu,' but we do not find a definition of the right until we get to the end of the first page, and then it comes in in rather an incidental manner and not with the sharpness it should do. Again, in reference to the clause in charter parties 'so near thereto as she may safely get' there seems to be a contradiction between pp. 222 and 223, which a more powerful grasp of the subject would have avoided. The vessel it is stated must be prevented from getting within or near to the port 'by an obstruction of a *permanent* character' (the italics are the author's). At the top of the next page,

however, we find that the obstacle need not be one 'that is absolutely permanent.' But if a thing is not absolutely permanent it must be temporary, so that the second dictum destroys the first. But while making these comparatively unfavourable observations, it has to be remembered, that had this book been as powerful as it is laborious it would have been a very remarkable work. So much of the law in regard to the carriage of goods is concerned with details and with facts, that there is probably no subject in which an author would find it more difficult to get the better of details. It is no small praise therefore to accord to Mr. Carver, that he has produced a careful and accurate treatise, and has—we may point out—avoided the mistake of bringing in cases in too wholesale a manner. For the quotations from judgments are brief and to the point. It is perhaps to be regretted that he allowed himself to deal so lengthily with the question of salvage, for what concerns the parties to the contract of affreightment is not the principles of the law of salvage, but the liability of ship, freight, and cargo to contribute to the payment of it. This is an important and legitimate part of the subject of this work which is clearly treated of by Mr. Carver, though the latter part of Sir James Hannen's judgment in *The Raisby* (L. R., 10 P. D. 114) in regard to it not being the duty of a shipowner to obtain a bond for salvage from the consignees of a cargo, does not appear to be noticed.

The Law relating to Chief Rents and other Rentcharges and Lands as affected thereby, with a chapter on Restrictive Covenants, and a selection of Precedents. By WILLIAM HARRISON, Solicitor. London: Stevens & Sons. 1884. 8vo. xx and 256 pp.

THIS is a little book which is evidently based on a great deal of research, but it will be more useful to the learned reader than to the student. The language is not sufficiently accurate to make it a safe guide for the student. Thus on the very last page we read: 'Covenants may also be enforced by means of the limitation of a rentcharge out of the land, with a proviso remitting payment so long as there is no breach.' The very basis of the ingenious suggestion here alluded to is the difference between a *proviso* and a mere personal *covenant*. A proviso would be open to the objection on the ground of remoteness, from which a covenant is supposed to be free. On such a delicate point it is difficult to pardon Mr. Harrison for using the word *proviso* instead of the word *covenant*.

We have found in several other passages a similar inexactness, and here and there an impression is created that the author is a little out of his depth. 'The rule of law which enables a tenant in tail of land to acquire the fee simple, by barring the entail, has no application to a rent granted in fee tail, in which there is no fee simple to acquire.' Waiving any criticism on the expression 'rule of law' in this sentence, we find fault with Mr. Harrison for writing *granted* where he should have written *created*. When however Mr. Harrison (p. 24) goes on to say that on the same ground the 65th section of the Conveyancing Act, enabling long terms in land to be enlarged into a fee simple, has no application to rents held for long terms, it looks as if he had misapprehended the real reason why it is said that rents created in tail, even with remainder in fee simple, cannot be enlarged into a fee simple; viz. that each limitation is a new rent.

On p. 190 there is what we cannot but think a misapprehension of the effect of s. 62 of the Conveyancing Act, 1881: 'As there is nothing in this section to restrict the rights which may thus be limited to such as were recognised

by the Common Law, it would seem possible by its aid to create obligations in regard to land of the same character as those supplied by restrictive covenants, but possessing besides the important advantage of being legally binding upon the land and its successive owners irrespective of notice.' We admit that Mr. Harrison is fully justified in his conclusion by the language of the Act; and that his mistake, if it be a mistake, is due to the inefficiency of the draftsman (or the mangling of his work in the House of Commons) for which this Act is famous. What the draftsman really meant is indicated by Messrs. Wolstenholme and Turner in their note on this section.

There was no doubt plenty of room for a book on the subject to which Mr. Harrison has devoted his attention; but we do not think that his book covers the ground so completely as to deter competitors.

The Acts relating to the Income Tax, with references to the decisions on the subject. By STEPHEN DOWELL, Assistant Solicitor of Inland Revenue. Second Edition. London: Butterworths. 1885. 8vo. xliii and 375 pp.

THE law of taxation is a topic rarely studied by any one but officials or practitioners; yet it is a subject full of speculative interest, and like many other departments of law deserves to be carefully examined by historians. Mr. Dowell's well known *Income Tax Laws* is the work of one of those few observers who have perceived the full importance of historical finance, and it is well worth notice that a writer who has traced out with care the history of each impost is also the first living authority on the law which actually regulates the most important of existing taxes. We welcome the second edition of his well-known book with the greatest pleasure. It is recognised by every one who is at all versed in matters of revenue as a complete and authoritative collection of all the enactments bearing on the Income Tax. It were idle to say much in commendation of so well known a manual. Two points, however, deserve special notice. The first is that Mr. Dowell's book is much more than an annotated edition of a particular statute; the Income Tax Acts constitute a whole body of legislation, and if they were reduced to a single statute (as they certainly would be if Parliament were a body with any care for the amendment of the law), they would constitute a pretty long code. The second point is that Mr. Dowell's book is the authority on which judges, no less than barristers, rely whenever the Court is bored and puzzled by a case relating to Income Tax. We should doubt whether there is any barrister ignorant or learned enough to argue an Income Tax case, unless he has *Dowell* in his hand or in his bag; he knows that he will find in Mr. Dowell's pages everything that he wants and, what is equally important, nothing that he does not want.

English Citizen Series. The Punishment and Prevention of Crime. By COL. SIR EDMUND F. DU CANE, K.C.B., R.E. Macmillan & Co. 1885. viii and 235 pp.

THE English citizen who casts his eyes along the row of little books designed by Messrs. Macmillan for his instruction, will think that the treatment of criminals must be a large topic, twice as large as 'The Central Government,' twice as large as 'Local Government.' Such an opinion can only be maintained in defiance of all sound canons of perspective even by the most devoted champion of 'the science of penology,' a science which we are sorry to find existing. If we are to consider this Citizen Series as an

artistic whole, we must note want of proportion as a blemish. Still we cannot regret that Sir Edmund Du Cane has spoken at some length (after all, it is no great length) about a subject with which he is and few others are familiar. Of our penal system the average Englishman, it may safely be said, knows next to nothing, and the average lawyer knows but little more; his interest in the criminal ceases when once sentence is passed, and seldom has he any occasion to consider what that sentence will really mean for him who undergoes it. What is more, this general public ignorance is likely to increase because of the centralising movement of which Sir Edmund Du Cane is both a chronicler and a chief director. Country gentlemen, justices of the peace, have now much less reason for acquainting themselves with prisons than they had a few years ago. To Sir Edmund very naturally this seems well; it is good that gaols of every sort and kind should be outside the domain of our 'local self-government' and within the domain of a central bureau. He is (to how many readers will this list of titles convey any distinct ideas?) Chairman of Commissioners of Prisons, Chairman of Directors of Prisons, Inspector-General of Military Prisons, Surveyor-General of Prisons, and as such is disposed to see the best side of some recent changes which have other sides than their best. However, this book, though cheerful over things as they are, or are just going to be, is not an advocate's pleading, but a plain, clear, trustworthy account of existing facts and laws, relieved by glimpses at a past which certainly has been bad enough. Much law not to be found in any of our reports or text-books, nor in the statute-book either (for we live in a day when Home Secretaries and others can unobtrusively publish little codes which shall have statutory authority), is here stated succinctly, and, as it seems to us, correctly. A law student might spend his time much worse than in carefully reading a book such as this, which is none the less a book of law because it happens to be readable. About Norfolk Island and the hulks, Howard and Mrs. Fry, there is what should interest readers who have any care for the history of their country. A word might perhaps have been given to Bentham and his darling Panopticon, but the work is good as it stands.

The Law of Guarantees. By Henry Anselm de Colyar. Second Edition. London: Butterworths. 8vo. xxxi and 446 pp.

Since the first edition of Mr. De Colyar's book was published, many important changes of procedure affecting guarantees have taken place. The equitable doctrine of contribution between sureties is now applicable in every branch of the High Court; a claim on a guarantee may be enforced by specially endorsed writ; a surety sued upon his guarantee may assert his right to contribution by a third party notice. Changes like these, together with the ever accumulating authorities on the subject, render a new edition of this useful work very acceptable. Mr. De Colyar deprecates criticism by pleading in this preface the very difficult nature of the law of guarantees. This was perhaps needless in a second edition. In fact the difficulties—such as those created by the Statute of Frauds—are fully and carefully considered. In connection with the Statute of Frauds, Mr. De Colyar discusses the somewhat surprising decisions which determine that a del credere agent is excluded from the operation of the Statute. In *Morris* v. *Cleasby* (4 M. & S. 566, 574) Lord Ellenborough says, 'In correct language a commission del credere is the premium or price given by the principal to the factor for a guarantee, but whatever the term used, the obligation of the factor is the same, it arises on the guarantee.' In *Couturier*

v. *Hastie* (5 H. L. 673) the House of Lords departing from this view decided that the main object of the agreement between such a del credere agent and his principal is not the payment of the debt of another, but the taking greater care by the agent in finding purchasers for the goods of his principal. As such the agreement is outside the Statute, and so it must now be accepted. After dealing with the nature of the contract of guarantee, Mr. De Colyar traces out with admirable clearness of method and statement, the respective rights and liabilities of creditor, debtor, surety and co-surety which flow from it, concluding with the discharge of the surety. He shows a firm grasp of legal principles which gives his book a real scientific value.

We have gone through all the recent authorities on the subject and have only been able to find two which have escaped Mr. De Colyar's notice: *Atkins* v. *Arecdeckne* (48 L. T. R. 725) and *Leddell* v. *McDougall* (29 W. R. 403). The book is well and fully indexed. It would be still better if the sub-headings were arranged in alphabetical order.

Index to the London Gazette, 1830–1883. Compiled for the Incorporated Council of Law Reporting by Alexander Pulling. London: Wm. Clowes & Sons, Lim., 1885. Large 8vo. xlii. and 2010 pp.

This massive volume, of uniform size with the Chronological Table and Index of the Revised Statutes, is of nearly the same bulk, but, being printed on thinner paper, contains more matter. Its very title compels abridgment, and we may assume that the editor is the only person who ever has read or will read the whole or any considerable part of it. As a book of reference, it will be of the utmost value to those whose work leads them into the region of Orders in Council and other acts of delegated authority which do not appear on the statute-book, but without which the real operation of statutes often cannot be understood. Not many persons outside the departments where such rules are made, and the callings immediately affected by them, have any adequate notion of the extent to which our modern public law has been built up in this way of legislation by deputy; and, with proper care and caution, a very good way too. Parliament seems incapable of passing a Criminal Code, but it has enabled the judges to make what is, to all practical intents, a Code of Civil Procedure, and it has been made and put in force without any objection in principle that we have heard of, and with only the inevitable amount of professional grumbling in detail.

Concise Precedents in Conveyancing; revised and adapted to the Conveyancing Acts, 1881, 1882, *and the Settled Land Acts*, 1882, 1884, *with practical notes and observations on those Acts, and on some earlier Acts relating to Real and Personal Property.* By M. G. Davidson, Barrister-at-law. 14th edition. London: W. Maxwell & Son. 1885. 8vo. xxvi and 815 pp.

The popularity of this little book makes any account of its contents superfluous. The recent legislation is likely to render it useful to a still larger number of practitioners than those who have hitherto relied on it; and we have always considered it the best book for the student to read after he has mastered his Williams on Real Property and Williams on Personal Property. The present edition represents, probably quite as well as a more pretentious work, the actual practical results of the new statutes on the subject, so far as those results have been as yet ascertained; and it seems to be worthy of the reputation of its thirteen predecessors.

Bourdin's Exposition of the Land Tax, including the recent judicial decisions, and the incidental changes in the law effected by the Taxes Management Act, with other additional matter. Third Edition. Revised and corrected by SHIRLEY BUNBURY, Assistant Registrar of Land Tax. London: Stevens & Sons. 1885. 8vo. xii and 182 pp.

MR. BUNBURY'S new edition of Bourdin's *Exposition of the Land Tax* is a very welcome and useful addition to the literature of taxation. It is greatly to be regretted that the bills to which Mr. Bunbury refers in his preface should never have passed into Acts; they would have made clear a branch of the law which it concerns every man to understand, and which nevertheless to the majority of tax-payers forms a maze in which it is easy to lose one's way, and which is full of pitfalls. No guidance could under such circumstances be better than that of an experienced official like Mr. Bunbury, who availing himself of the sort of chart supplied by Bourdin, brings Bourdin's plan of the Land Tax Law up to date. If we are not to have a complete Land Tax Act the next best thing is a clear official manual, and such is the concise exposition of the Land Tax presented to the public by Mr. Bunbury. This work too, like Mr. Dowell's, has an historical interest, it brings before the reader's mind a scheme of taxation belonging to an age different from our own, and without any intention on the part of the author to enter into political discussions, inevitably suggests to the mind of an intelligent student the question whether the whole system of our taxation of land has not been marked by grievous errors. The scheme for the redemption of the Land Tax has prevented the introduction of a systematic scheme for the taxation of real property, and the desire on the part of Pitt to conceal that the so-called Income Tax was to a great extent a tax on land has, it may be suspected, introduced a good deal of complexity and of consequent unfairness into the provisions of the Income Tax Acts.

Journal du Droit International Privé. Dirigé par M. EDOUARD CLUNET. Paris: Marchal et Billard. Nos. I–X. 1885.

THE current numbers contain several interesting articles besides the valuable matter relating to decisions and treatises periodically collected by M. Clunet for the use of international jurists.

M. Lainé, professor at the Paris École de droit, publishes in the first three numbers instalments of a treatise on the theory of the statutes in French Private International Law. M. Lainé finds the origin of the statutes in Italy. In Lombardy the statutes were the municipal laws adopted by the towns. They were the particular law of each. Above them was the general or common law—the Lombard or the Roman law. Out of this co-existence of different laws sprang conflicts. In France the conflicts were between the customs of France and between these and the customs of adjoining countries. M. Lainé endeavours to show that the theory of the statutes which thus began passed into the solution of conflicts of the laws of different states, and it thus was ready in 1804 to become the basis of the private international law of France.

Another interesting paper is contributed by M. Ch. Lyon-Caen on the position of foreign joint—stock companies in France. M. Lyon-Caen is one of the framers of the project now before the French parliament. His views are therefore of importance and seem very sensible, though at first they might prove a little troublesome. He proposes

that foreign insurance companies should be placed under the same supervision as French companies, and that foreign companies of all kinds with branch offices in France should be obliged to give the same publicity to their articles as French companies.

Among the other papers we notice one by M. de Rossi on jurisdiction in cases of collision between ships of different flags on the high seas, and another on the regulation of salvage between ships of different flags by M. Demangeat, both of which our readers will consult with profit.

Revue de la Réforme Judiciaire. Dirigé par M. Victor Jeanvrot. Paris: Chevalier-Maresco. Nos. I–V. 1885.

As far as we have been able to perceive, this new publication is well edited. One useful feature we have observed is short notices of papers on matters of interest to jurists, published elsewhere or read before the Academies. The articles are of a more or less practical character, relating to matters of current reform in accordance with the objects of the review. Whether the editor might not improve it by suppressing the statistical notes, and giving short notes of current cases in their place, we leave for his consideration. Be that as it may, the new publication gives a good practical view of current legal topics in France.

A Guide to the House Tax Acts, for the use of the payer of inhabited house duty in England. By Arthur M. Ellis, Solicitor. London: Stevens & Sons. 1885. 8vo. xi and 155 pp.

Mr. Ellis's little book does not stand on anything like the same high level as that occupied by the two authoritative treatises already noticed; it is not a bad book of its kind, but it belongs to that rather dubious class of legal literature which is called 'popular.' The book will be found useful by the general reader, if that singular personage, whom everybody writes for and nobody ever meets with, ever concerns himself with legal enquiries. Nor is the book without interest; the process by which banks and other large houses of business which are crowded throughout the day, and often lodge a clerk or two at night, have escaped from a tax which falls on the shoulders of householders owning not one tithe of a banker's income, and dwelling in some house not filling half as much space as a bank, is worth careful observation and may possibly excite curious reflections.

Essai sur l'histoire du droit français. Par F. Laferrière, membre de l'Institut. Nouvelle édition publiée par Ed. Laferrière. Paris: Guillaumin & Cie. 1885. 2 vols.

This book, the last previous edition of which is dated 1859, had been out of print for some years, and, so far as we can gather from the Preface, the work has been reprinted without alterations or additions. Laferrière was a historian after the fashion of Michelet, and his works contain some of the same idealistic philosophy. Since his time, the very practical labours of Fustel de Coulanges and the German workers in the same field have thrown a new light on the history of early French institutions. This, however, does not diminish the utility of Laferrière's essay as a general view of the progress of French law till the time at which it was written. The first volume brings the reader to the French Revolution. The second deals with the genesis of the codes, and is full of valuable information.

Rules for the Interpretation of Deeds, with a Glossary. By Howard Warburton Elphinstone, Robert F. Norton, and James William Clark. London: William Maxwell & Son. 1885. 8vo. lviii and 697 pp.

A book on this subject has long been a great *desideratum*, for while the construction of wills has been the subject of numerous elaborate treatises, the parallel subject, the interpretation of deeds, has been utterly neglected. This is a very curious phenomenon; for, so far as fixed rules of interpretation are admissible at all for the purpose of construing written instruments, one would imagine that deeds *inter vivos* would require their application at least as much as testamentary instruments.

This book is a very meritorious attempt to supply—and in our opinion will go a long way towards supplying—the want we have referred to. It is framed somewhat after the model (a model indeed for a work of this kind) of Hawkins on Wills. By differences in the type, the rules are made readily distinguishable by the eye from the examples of their application, and from the comments thereon. There is also a running heading to the pages which will be found extremely useful. To proceed to more important matters, we may say that we have found, as was indeed only to be expected from the high professional position of Mr. Elphinstone, that the statements of the various points are clear, concise, and correct. If we venture to draw attention to a few particulars in which we think the book might be improved, it is rather in the hope that the authors may soon see their way to a second edition, than from any want of gratitude to them for this one. In the first place, we confess that we should have much liked to find a chapter on the peculiarities of Crown grants. And there is a terribly long list of 'addenda et corrigenda.' This, however, is explained in the preface to be due to unavoidable causes. We are rather surprised to find no discussion of the rule as to a pronoun 'proximo antecedenti refertur,' which, with the remarks of Lord Bramwell in *Ewing* v. *Ewing*, 8 App. Cas. at p. 831, would seem to be germane to the subject. Neither do we find any mention of *Osborn* v. *Bellman*, 2 Giff. 593, which extended the doctrine of *Jones* v. *Westcomb* to a marriage settlement; nor of *Re Palmer's settlement*, L. R. 19 Eq. 320, which decided that 'survivor' might be read as 'other' in a settlement. We think this latter case ought certainly to have been cited on p. 285. But it is idle to expect, in the first edition of a work on what is practically virgin soil, the completeness which future editions will doubtless realise.

Legal Education, its Aim and Method. An inaugural lecture delivered at Queen's College, Cambridge, by Gerard B. Finch, Law Lecturer and late Fellow of Queen's College. Cambridge: Macmillan & Co.

Mr. Finch has begun his career as a teacher of law at Cambridge by two important contributions to the study of law. His selection of cases on Contract is noticed on another page.

In his lecture on the Aim and Method of legal education, he provides one of the best statements we have ever read of the claims of English law to form a regular and acknowledged part of University training. No one has ever described better than Mr. Finch the liberal, wide, and stimulating effect of legal speculation. He points out how the history of law connects itself on the one hand with the development of English national life, and on the other hand with the exercise of all those mental faculties which are

acquired for the mastery of logic or of political economy. 'The study of law,' as Mr. Finch puts it, 'involves the study of ethics, history, politics, economics.' Law is, to state the same idea in a somewhat different form, a branch of applied logic. It is logic applied to the practical definition of the rights and duties of citizens in so far as they are recognised and enforced by the power of the State. If any man conceives that such a topic is one which cannot stimulate liberal interest and enlightened curiosity, he either knows nothing of what law really is or fancies that a great lawyer attains success by acquaintance with the routine of practice rather than by mastering the fundamental principles of legal knowledge. To any victim of this delusion we confidently recommend the perusal of Mr. Finch's inaugural lecture.

Codification of the Sheriff Court Acts, with Draft Bills, &c. By GEORGE B. YOUNG, Member of the Faculty of Procurators, Glasgow. Glasgow: William Hodge and Co. 1885. 8vo. 140 pp.

THE object of this work is a very useful one. Besides their very important administrative functions and criminal jurisdiction, the Sheriffs and Sheriffs-substitute in Scotland have a civil jurisdiction of much greater relative importance than that of the County Courts or other inferior Courts in England. This is the ancient jurisdiction of the Sheriffs as judges ordinary of their districts, modified and defined by numerous modern statutes. Of these there are two, passed in 1838 and 1853 respectively, which together may be said to constitute a sort of Code of Civil Procedure for the Sheriff Courts. But there are a variety of other Acts to which the practitioner in these Courts must have frequent occasion to refer on special points: and it would certainly be very useful to have a Consolidating Act dealing with everything relating to the civil jurisdiction of the Sheriff. The work before us gives a Draft Bill for such a proposed Act; and it may be safely said that whoever takes up the subject with a view to serious legislation will find an excellent basis for his work in this draft. The preliminary matter of thirty-four pages contains a statement of objects and reasons which is interesting as a statement from the point of view of one who is conversant with the actual working and history of these Courts.

A Concise Treatise on the Law of Wills. By H. S. THEOBALD. Third Edition. London: Stevens and Sons. 1885. Large 8vo. cxv and 695 pp.

MR. THEOBALD'S treatise is named concise, and justly so; yet in this third edition the body of the text alone exceeds 600 pages. Such is the irony of fate that pursues the writers of good law-books. The practising lawyer discovers their merit, and clamours for a full table of cases, and the cases he must have. Mr. Theobald, in his original preface, modestly describes the rules of construing wills as 'no more than a collection of arguments for or against the different constructions which may suggest themselves in the interpretation of the meaning of testators.' The inveterate habit of English practice is to take this quite literally, and see 'no more than a collection of arguments' in any legal principles, or in any exposition of them however authoritative. And while this habit lasts, those who go about to improve our legal literature must feel that they are fighting with one hand tied. But at worst the evil will one day bring its own remedy, as to a large extent it has already done in America.

Collection des principaux Codes étrangers. Code de procédure pénale allemand. Traduit et annoté par FERNAND DAGUIN. 1884. 1 vol. *Code d'Organisation judiciaire allemand.* Traduit et annoté par L. DUBARLE. 1885. 2 vols. *Les Chartes coloniales et les constitutions des Etats-Unis de l'Amérique du Nord.* Par ALPHONSE GOURD. 1885. 2 vols. Paris: Imprimés par ordre du gouvernement.

THESE three works form part, as is seen, of a series of translations of foreign codes published by the French Government.

French criminal law and civil procedure stand in need of reform. Everybody admits this: and, but for the plethora of 'dynastical' measures, Parliament would take the question of reform up. The existence of this *desideratum* explains the selection of such subjects as the German Codes on Criminal Procedure and judicial organisation.

This, however, was not the primary object of the publication of these translations, which were simply intended to supply Frenchmen with a kind of information useful to the community at large, and not easily obtained. The translations are made by lawyers of tried ability, and are supervised by the Board of Foreign Legislation at the Ministry of Justice and the Society of Comparative Legislation. The first of the three, translated by the indefatigable general secretary of the latter body, is also of interest to English reformers at the present moment.

Cours de droit égyptien. Par EUGÈNE REVILLOUT. Paris: Ernest Leroux. 1884. Vol. I.

THE publication of the first volume of a book on Egyptian Law is a fact so novel, that our readers will be glad even simply to know of its existence. Later on we shall publish a more detailed notice of M. Revillout's interesting work.

Meanwhile we may state that the first volume treats of persons. The second, as the author informs us privately, will also treat of persons with especial reference to marriage and the position of women at different periods. The third and fourth will deal with the law of property and things; and the fifth and sixth will complete the work with the law of obligations and actions. The second volume will appear shortly.

M. Revillout has been lecturing for some years back at the Louvre on the subjects of his work. Could we not, by the way, utilise our able Librarians at the British Museum in a similar way with benefit to science and the public?

The Student's Guide to Trusts and Partnership. By JOHN INDERMAUR. London: George Barber. 1885. 8vo. 104 pp.

THIS is one of a class of books—examination manuals—on which we think it right to look with suspicion. Examinations and all their appurtenances are at best a necessary evil. Mr. Indermaur does, however, begin with an introduction, in which he very honestly warns the student against putting his trust in a Student's Guide alone, and even advises him to read leading cases at large. These summaries and their appended questions and answers are intended to consolidate and improve the memory of what has been read elsewhere, and that is a legitimate process. For our own part, we think with Roger North that a man's own notes of his books and authorities

are likely to do him better service than any provided for him by another man, though the other man's may, in themselves, be better. One good thing is that a student who does put his trust exclusively in this Guide, will probably be found out: for Mr. Indermaur's definition of 'partnership in its widest and most comprehensive sense' is so wide as to leave out the essential element of an intention to share profits. Mr. Indermaur must know very well that the members of the Incorporated Law Society, or of a cricket eleven, are not partners, neither were the six carpenters who became joint trespassers; but he has not said so even by implication.

The Laws concerning Religious Worship; also Mortmain and Charitable Uses. By JOHN JENKINS, a District Registrar of the High Court of Justice, &c. London: Waterlow Brothers and Layton. 8vo. xlii and 194 pp.

WE are told in the Preface that this work contains, amongst other things, a chronological narrative of ecclesiastical legislation in England, with abridgments of the Statutes on the subject, from the Conquest to the present time. While we find the 'Ascension of Queen Anne' and the 'Ascension of George I' duly noted and dated, it is rather startling to find that the Public Worship Regulation Act, 1874, is not even mentioned. Presumably the author, whose work is mostly concerned with Dissenters, considered that Act to relate only to irreligious worship. The book is full of misprints, many of which are clearly not due to the printer. As an example of the felicity of our author's language, we may cite the following from p. 138: 'A father who is also tenant for life of the estates—consequently natural guardian of his infant son entitled thereto in remainder—can concur, &c.' On p. 148 we have one of those delicious things which occasionally enliven the reviewer's life: 'A gift by will or testament of money charged upon or payable out of land, or freehold or copyhold property, or chattel real is void, *ex gregibus* the proceeds from the sale of such property.' Mr. District-Registrar Jenkins appears from the title-page to be also the author of a 'Treatise on National Education.' We envy those reviewers whose functions, less restricted within technical bounds than those of this Review, have brought them the privilege of examining that treatise. The work now before us affords suggestive, but still incomplete, materials for a treatise on the individual education of a District Registrar of the High Court of Justice.

Conduct of Lawsuits out of and in Court: practically teaching, and copiously illustrating, the preparation and forensic management of litigated cases of all kinds. Being a new edition of 'Practical Suggestions,' revised and re-written, by JOHN C. REED, Author of 'American Law Studies.' Boston: Little, Brown & Co. 1885.

WE do not claim to be intimately acquainted with Mr. John C. Reed's *Practical Suggestions*, of which his present work is a new edition; nor can we pretend to have studied his *Conduct of Law Suits* with great minuteness. An experienced reader, however, feels no difficulty in perceiving what kind of work it is. The book is intended to be popular and will, it may be expected, obtain a good deal of popularity; for there is about it nothing profound, and it has an air of lively and pretentious common sense, which is very taking with a large class of the public. We have indeed

much more doubt about the practical utility of the kind of advice which Mr. Reed gives than of its popularity. Such hints, for example, with regard to the examination of a witness, as that 'you should in general follow the prevailing current of the transaction in hand, the chronological order is not to be adopted at all times. It will often be beneficial to bring out prominent and important facts independently—to make them conspicuous by isolation'—will sound to a youthful attorney's clerk or to a newly called barrister like utterances of oracular wisdom; but will on examination be found, like most oracles, to be as useless as they are impressive. The plain truth is that practical books like Mr. Reed's *Conduct of Law Suits* are of little real value, for a reason which often escapes both authors and students. From books you may learn principles, but principles are exactly the things which the 'practical' teacher does not profess to supply. Practical skill again is in the forensic, as in every other art, of infinite value; but practical skill is either a gift of nature or, far more often, the result of practice. It will never be gained by the most assiduous study of the most obvious of maxims or truisms. If Mr. John C. Reed's book were the work of an Englishman, we should not commend it very strongly to the attention of our readers; as the work, however, of an American lawyer it possesses a special though probably an unintended interest for the English barrister; it exhibits by way of contrast the results, bad and good, of the system which with us divides the functions of barristers and solicitors. We do not the least contest the partial truth of the view entertained we suspect by almost every American lawyer that this division is, as Mr. Reed terms it, an 'incurable evil.' But any one who glances at Mr. Reed's pages will see that this evil has some compensations. The 'rehearsals' at a counsel's office of the evidence to be given at a trial, to which our author attaches so much importance, are no doubt of great advantage to an acute advocate, and we must add to an unscrupulous client. Whether they promote the cause of justice, and thus benefit the public, is a more doubtful matter. This is a subject, however, which perhaps hardly comes within the consideration of a writer whose object is to give practical suggestions.

We have received *The Annual Practice*, 1885–6. The learned authors (Mr. Thomas Snow, Mr. Hubert Winstanley, and Mr. Joseph Walton) deserve our thanks for having managed not to increase its bulk, 'although the decisions' on points of practice 'during the current legal year have been very numerous.' We can only hope that periodical revision of the Rules of Court, after the example set in 1883, will prevent the necessity of the *Annual Practice* outgrowing its 1140 and odd pages to any great extent.

Last January we observed, and we feel bound to observe again, that the citation of text-books from old editions is a blemish in this otherwise commendable work. Such references are inconvenient, peradventure even misleading, to the practitioner, and are hardly fair to the authors cited.

NOTES.

Is there anything of the nature of copyright in lectures delivered at the Universities?

This enquiry has been raised in Scotland with the utmost precision in the case of *Caird* v. *Sime*, and has been answered by the Court of Session, to the astonishment, we are told, of many Scottish lawyers, with a distinct negative.

The Copyright Act of 1835 (5 & 6 Will. IV. c. 65), argued the Court, has no application to lectures delivered in the Universities, and on this point the Court we venture to say are undoubtedly in the right. A professor's right (if any) to legal protection from moral piracy at the hands of his students depends, the Court therefore infer, not on any statutory enactment but on some general legal principle. So far the Court must carry with them the assent of every lawyer throughout the United Kingdom. The only principle which according to the majority of the Court of Session can be invoked in favour of Professor Caird and of other teachers in his position is that a person who addresses an audience has a right to determine the terms on which he communicates his information, and may in general make it part of these terms that the information given shall not be printed and sold without his permission. So much as this, if no more, is clearly established by *Abernethy* v. *Hutchinson*, 3 L. J. (Ch.) (O. S.) 209 and *Nicols* v. *Pitman*, 26 Ch. D. 374, both of which decisions are treated by the Court of Session as more or less binding authorities. The question therefore whether Professor Caird has a legal claim to restrain the publication of his lectures depends on the terms upon which they were delivered. If they had been like Abernethy's delivered by a private person for gain, the Court of Session would, if we understand their view rightly, have held that the lectures were given for the purposes of instruction only, and therefore on the implied condition that they should not be used for the utterly different end of sale to the booksellers. As however the lectures were delivered by Professor Caird in discharge of a public duty they were in the opinion of the Court delivered on the terms that the hearers might make any use they chose of the information given them. In other words, Abernethy's lectures were not 'published,' and Professor Caird's were 'published.' Abernethy communicated his instructions to a select class; Professor Caird addressed the whole world. The conclusion follows that the Professor has no property in his words, and that he must trust to his own ethical teaching for raising the moral tone of his class; he cannot claim any protection at the hands of the law.

This conclusion is a startling one. We do not undertake to assert that it is wrong, but we do assert that its correctness is open to grave doubt. More than one objection may be taken to the doctrine that the lectures of a University professor are necessarily published to the whole world for every purpose whatever. This dogma is inconsistent, not perhaps with the decision of Lord Eldon in Abernethy's case, but undoubtedly with his *ratio decidendi*. The comparison drawn by him between the position of Abernethy and Blackstone, exactly anticipates and disposes of the distinction supported by the Court of Session; and *Nicols* v. *Pitman*, 26 Ch. D. 374, no less than the very remarkable American case of *Palmer* v. *De Witt*, 7 Am. Cas. 480, show the interpretation put by later judges on the principle involved in Abernethy's case. Again, the decision of the Court is certainly opposed to the common

understanding prevailing among both professors and students. It takes no account of the fact that in Professor Caird's case at least the unfair publication of lectures may produce pecuniary damage, and lastly the judgment of the Court is hardly consistent with the only principle on which, independently of statutory enactment, a lecturer or a dramatic composer can claim any kind of protection from the publication of a lecture or play. This principle is that information communicated to an audience must be taken to be published within those limits only which are fixed by the purpose for which it is given. A teacher communicates his ideas for the purpose of instruction; he does not communicate them for the purpose of enabling a smart hearer to make a pecuniary gain by stealing his teacher's ideas. Considering indeed the language used in *Jefferys* v. *Boosey*, 4 H. L. C. 815, 836, by so eminent a judge as the late Chief Baron Pollock, it is quite possible that professors, lecturers, and other persons who address the public have no property whatever, other than may be given them by Statute, in their spoken addresses. The conclusion of the Court of Session that Professor Caird has no legal remedy for the moral wrong done him may therefore be good law. But if this be so, which we are very far from admitting, then Abernethy's case and *Nicols* v. *Pitman* have been wrongly decided. In any case things cannot be left in their present condition. It is of the highest public interest that the judgment of the Court of Session should be carried up to the House of Lords. If that judgment be a correct interpretation of the law, then the time has come for legislation, which may restore to teachers at the Universities the rights possessed according to *Nicols* v. *Pitman* by every private lecturer. As things now stand, no lawyer at Oxford, Cambridge, Dublin, or Edinburgh can deliver expositions like Blackstone's without the risk of finding his work spoilt, and his prospects of fame and public utility ruined, through the premature publication of his addresses by any student who has been sharp enough to learn shorthand, and is unscrupulous enough to steal thoughts which he himself neither discovers nor understands. Judges might avoid injustice in particular cases by discovering fine distinctions of fact. But this would only add to the perplexity, already discreditable enough, of the whole law of literary and artistic rights.

A. V. D.

We receive from Mr. Elphinstone the following supplementary paragraph on the Limits of Rules of Construction (see LAW QUARTERLY REVIEW, vol. i. p. 468, line 17):—

Where the parties to an instrument mean different things by the words that they concur in using, there is no discrepancy on the face of the instrument, and it is not till we adduce evidence as to the primary meanings of the words that we discover that the words may bear two different meanings.

It may happen that the ordinary evidence as to the primary meanings of the words shows that the parties used them in different meanings, as in *Lever* v. *Jackson*, 30 Solors. Journ. 7 (a county court case), where the defendant, a coal merchant at Oldham, ordered by letter from the plaintiff at Manchester 'two waggons of gas cinders.' On its appearing by evidence that the words 'gas cinders' meant different things in the Oldham and Manchester coal trades, it was rightly held that there was no binding contract.

It may happen that the ordinary evidence as to the primary meanings of the words only shows that the words may bear more than one meaning, without showing that in which of those meanings either party used them, so that we have a case of equivocation, and we may resort to 'direct evidence

of intention' to show the different meanings in which the parties used the words. In *Raffles* v. *Wichelhaus*, 2 H. & C. 906, the defendant bought cotton from the plaintiff 'to arrive, *Ex Peerless*, from Bombay;' to an action brought by the plaintiff for non-acceptance of cotton, *Ex Peerless*, which sailed in November, the defendants pleaded that they meant the *Peerless*, which sailed in October; evidence of intention was admitted in proof of the plea, and on the plea being proved, it was held that the parties were not *ad idem*, and that therefore there was no binding contract.

H. W. E.

The *Ewing* v. *Orr Ewing* Cases, 9 App. Cas. 34, and 10 App. Cas. 453, have, taken together, both an international and a political importance.

What they technically decide is, (in substance,) that according to the law both of England and of Scotland, as interpreted by the House of Lords, the Chancery Division of the High Court has, when a testator or intestate leaves any movable property locally situated in England, a right to administer as far as lies in the power of the Court the whole of the deceased person's estate, even though he be domiciled in a foreign country and though the greater part of his movable property be locally situated in that foreign country.

The importance of the decision internationally, or (to speak more accurately) in reference to the rules of (so-called) private international law, is that it goes far to do away with the distinction between the 'principal administration' and an 'ancillary administration,' and certainly suggests or implies the conclusion that any Court called upon to administer a deceased person's estate may, while paying due regard to the law of the domicil, pay no regard to the rights of representatives appointed under that law. The decision admittedly conflicts with the opinion expressed by Lord Westbury in *Enohin* v. *Wylie*, 10 H. L. C. 13, and we suspect, though on that point it is well to speak with more hesitation than is displayed by some of the Scotch judges, that the doctrine maintained by the House of Lords is not in harmony with the rules as to the conflict of laws upheld by the tribunals of Continental countries or of America.

The importance of the decision politically lies in the curious light which it throws on the relation between England and Scotland. The Treaty of Union has worked so well that men forget how complicated are the arrangements which it established, and how easily they might not have worked at all. The last *Ewing* v. *Orr Ewing* case makes clear what no one (except oddly enough the late Master of the Rolls) ever doubted, that Scotland and England are for judicial purposes in theory at least 'foreign' countries, and that the House of Lords is really two Courts, namely an English Court of Appeal on matters of English Law, and a Scottish Court of Appeal on matters of Scots Law, and that the judgments of the House in the one capacity may conflict with its judgments in the other capacity. From this state of things it is obvious at any moment that serious conflicts of jurisdiction may arise between Scottish and English Courts. In fact, however, the double character of the House of Lords tends imperceptibly but with certainty to assimilate the law of the two countries, and on the whole, we have no doubt, to modify Scots Law so as to bring it into harmony with the Law of England. That this should be so is from the nature of things inevitable; the majority of the House of Lords are English lawyers; they are imbued with English habits of thought; it is vain to suppose that Lord Selborne or Lord Bramwell sitting with the same colleagues in the same place, whether he be acting as an English judge

or a Scots judge, will not be influenced by English training and English traditions. If we do not take this plain matter of fact into account, there is some difficulty in understanding how on a question of principle like that involved in *Ewing* v. *Orr Ewing* the judges of the Court of Session should without hesitation take one view and the legal peers should equally without hesitation take an opposite view. The adherence of Lord Watson to the views of his English colleagues tends to show that the House of Lords were theoretically in the right. But even law lords are men, and we may suspect that the practical impossibility of contradicting the doctrine already established between the same parties in the English case had a good deal to do with the unanimity of the House in pronouncing the second decision. We should not wonder if Scottish lawyers felt themselves somewhat aggrieved; the point to notice is that the modification of Scots law or overruling of Scottish opinion by the House of Lords is in the main a national benefit and rarely or never produces a sentiment of genuine grievance. Every sensible man knows that in a political partnership like the Union, if the wealthier partner gets some nominal advantages, both sides and especially the poorer partner gain infinitely by keeping up the partnership.

In our April number we expressed an opinion that the correctness of the decision pronounced by the Court of Appeal in *Last* v. *London Assurance Corporation*, 14 Q. B. D. (C. A.) 239, was questionable. Our doubts have been justified; the House of Lords (*Last* v. *London Assurance Corporation*, 10 App. Cas. 438) has reversed the judgment of the Court of Appeal, and has re-affirmed the broad principle, that 'profits' for the purposes of the income-tax means, as regards any business, the excess of receipts over the expenses by which receipts are earned. This surplus does not cease to be 'profits' because of the mode in which it is expended. The result is that the statutory and the economic meanings of 'profits' are different; and Lord Bramwell's dissenting judgment proceeds on the supposed inconvenience of making such a difference. Practically the decision adds somewhat to the advantages of the purely mutual system of life assurance.

A learned contributor sends us the following note on the meaning of the word 'customs' in the oath of fealty:—

'When a freeholder doth fealty to his lord, he shall hold his right hand upon a book, and shall say thus; Know ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do, at the terms assigned, so help me God and the saints: and he shall kiss the book.' Lit. Ten. s. 91.

The late Mr. Joshua Williams says (Williams on Seisin 11), 'The oath evidently implies that there may be customs incident to the tenure of a freehold estate on fee simple. Some persons seem to suppose that if there be a custom of any sort attached to a tenure it cannot be freehold. This is a great mistake;' and he cites *Perryman's Case*, 5 Co. Rep. 84. It follows that in Mr. Williams' opinion the word 'customs' in the oath meant local usages.

It appears, however, that the words 'when a freeholder' were introduced into the oath, not for the purpose of distinguishing the oath of fealty of a freeholder from that of a tenant for years, but from that of a tenant in villenage, which is given in Co. Lit. 68a. See also the different forms of the oaths of a freeman and a villein in 17 Ed. 2. Stat. 2.

Notwithstanding some doubts that have been felt, it is clear that a tenant for years had to do fealty; Co. Lit. 67b, and see note 2. Bracton, Lib. 2, 80a, says 'De nullo tenemento quod tenetur ad terminum fit homagium, fit tamen inde fidelitates Sacramentum.' See also Lit. Ten. ss. 131, 213, 214; Co. Lit. 142 a, b, 143 a. I can find no statement as to the form of the oath of fealty taken by a tenant for years, but as in Lit. Ten. 5. 131 it is stated that 'fealty is incident to all manner of tenures, but to the tenure in frankalmoigne,' and as there is no trace of any difference between the oaths taken by tenants holding under different tenures, except tenants in villenage, it is reasonable to suppose the oath taken by a tenant for years was the same as that taken by a freeholder.

As the reciprocal rights and duties of a tenant for term of years, and his lord, i. e. the reversioner, originally depended entirely upon contract, it is difficult to see any meaning in an engagement by such a tenant to perform the 'customs' which he ought to perform if by customs were meant local usages. If therefore custom does not mean local usage, we are thrown back in some other meaning of the word: one such meaning is given in Y. B. 22 Ed. I, 364, Rec. Pub., 'Customs are things which are done and demanded by reason of bodily service: services are things which are demanded of the tenant by reason of the tenement which he held of the demandant, to wit, rent and things of that kind, or suit demanded by reason of the tenement.'

Another meaning will be found in Ducange, who gives as one of the meanings of 'Consuetudo,' 'Præstatio pensitatio quæ ex consuetudine præstatur cujus initium ignoratur et a quo inducta,' which bears nearly the same meaning as our 'Customary payment.' Many instances will be found in Domesday (see the Index s. v. Consuetudo) of the use of Consuetudo in this meaning; see also Stubbs' Select Charters, 89, 364. In one, and possibly in more than one, place Consuetudo is used in Domesday for a payment in kind: 'Addita est huic M. Csuetudo id est xviii oves in anno.' See vol. i. p. 86b.

Students, text-writers, and even judges have been a good deal perplexed as to the right application of the rule that—to use the language of that most accurate of writers, Mr. Stephen Leake—'if money has been paid in consideration of an executory contract or purpose which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed, and reclaim the money as if upon a failure of consideration.' Whoever wishes to see that the application of this principle may present difficulties to very eminent lawyers should compare *Wilson* v. *Strugnell*, 7 Q. B. D. 548, with *Herman* v. *Jeuchner*, 15 Q. B. D. (C. A.) 561. The two cases are as nearly alike as any two cases can well be; the essential facts are in each case as follows:—*A* has to find bail in the one case for his appearance before the Court, in the other case for his good behaviour during two years. *A* induces *X* to become his surety for a given amount by depositing with *X* the sum for which *X* becomes bail, and thus in effect guarantees him against any loss in case *A* should forfeit his recognizances. *A* before *X* has suffered any loss on his account brings an action against *X* for recovery of the money deposited with *X*. Both cases come before Mr. Justice Stephen; in both cases Mr. Justice Stephen holds that (what no one can doubt) the transaction into which *A* and *X* entered was clearly illegal, and further, that the agreement was not executed and that *A* had therefore a right, under the principle stated by Mr. Leake, to repudiate the agreement and reclaim the money. On *Herman* v. *Jeuchner* being brought before the Court of Appeal,

the Court dissent from Justice Stephen's view, and reverse his decision on the ground that the illegal purpose was completed when *X* became surety, and that therefore *A* could no longer repudiate the agreement.

We cannot doubt that the decision of the Court of Appeal is right, but a careful comparison of the different cases determining the position of the parties to an illegal contract certainly suggests that the whole matter needs reconsideration by the Courts, and possibly ought to be dealt with by the legislature. The principle for example, that while the illegal contract or purpose is still unperformed, one of the parties can always demand back any money he may have paid to the other party, might under conceivable circumstances become a means of putting pressure through the Law Courts on a person who is hesitating about carrying out an illegal transaction. It is again perfectly possible that, as in *Taylor* v. *Bowers*, L. R. 4 Q. B. 309, one of the parties to an unlawful contract may be more of a victim than a wrong-doer, and may therefore, even though the illegal purpose is in one sense completed, have a fair claim to the aid of the Courts. In any case one can perceive that many of the principles on this matter laid down by text-writers of authority and followed in a certain sense by the judges are, if taken in their literal and natural sense, of very doubtful expediency. Thus Lord Justice Baggallay expresses very great doubt whether 'in order to prevent a plaintiff from succeeding who sues to recover back money deposited in furtherance of an illegal purpose, the object itself must be fully carried out;' in other words, an eminent judge refuses his assent, and not without reason, to a principle which both Mr. Justice Stephen and the Court of Appeal have agreed in assuming to be part of the law of England. It may turn out that the rule is qualified by some such exception as suggested in a comparatively early case referred to by Bowen L. J., *Tappenden* v. *Randall*, 2 B. & P. 467.

Another case on the repudiation of agreements—this time for fraudulent preference between compounding creditors—is *Ex parte Milner*, C. A., 15 Q. B. D. 601. Those who prophesied that the Bankruptcy Act, 1883, would lead to a revival of common-law composition deeds and the learning thereof may now see their prophecy openly fulfilled.

The fusion of law and equity, or the great change which is commonly known by that name, has had the effect of enabling the present Master of the Rolls to distinguish himself in a way which was beyond the powers of any of his famous predecessors who have borne that ancient title. It has given him, sitting as Master of the Rolls in the Court of Appeal, the courage to confess his inability to understand the basis of the rule in Shelley's case. It has also enabled the 'Times' reporter, presumably a barrister, to publish the remark without any apparent sense of indecency. One Elizabeth Hayley, according to the report, who died in March, 1834, by her will devised a certain freehold tenement to trustees to hold upon trust for her daughter, Eliza Hayley, and her assigns during her natural life, and after her decease upon such trusts for the lawful children of Eliza Hayley as she should by any deed or by will appoint, and in default of such appointment, 'in trust for her right heirs for ever.' The will also conferred a power of sale in certain events upon the trustees. Eliza Hayley died in May, 1880, having previously sold the property to the defendants, and the plaintiff, her heir-at-law, brought the present action (*Richardson* v. *Harrison*) to recover possession, basing his claim upon the devise to the heirs of Eliza Hayley. On behalf of the plaintiff it was argued that the rule could not apply, inas-

much as the devise to Eliza Hayley was of an equitable interest, while it was contended that the remainder to the heirs, having regard to the various provisions of the will, was of a legal interest. A Divisional Court having held that the plaintiff was entitled to recover possession, the present appeal was brought. The Court allowed the appeal. The Master of the Rolls said he was not going to say anything about the rule in Shelley's case, though *he never could understand how any one could come to such a conclusion.* The rule, however, had now been in force too long to be altered.

The Lords Justices Cotton and Bowen concurred, but their concurrence was presumably limited to the reversal of the decision below.

We sympathise with the bishop who is by courtesy assumed to have been, upon his consecration, *ipso facto* endowed with a competent knowledge of ecclesiastical law, available as well for settling the petty squabbles of a thousand vestries as for instructing the ignorance of Judicial Committees; we extend a *modicum* of the same commodity to Lord Coleridge, struggling single-handed in the unfamiliar sea—*gurgite vasto*—of charitable trusts and licenses in mortmain, to prove the wickedness of the City Companies having anything to call their own; we may not find it impossible (knowing our judges to be much too hard-worked to find leisure for the study of abstruse ancient works, like Williams on Real Property) to pardon an eminent common law judge for a momentary, and after all irrelevant, expression of confused impatience; but it is impossible to forgive the reporter for giving publicity to that expression in a journal intended for the general reader. Reporters exist for the purpose of suppressing such things.

London School Board v. *Wood*, 15 Q. B. D. 415. This decision is of considerable interest both to persons interested in education and to critics who watch with care the working of our institutions. The decision in strict conformity with *Saunders* v. *Richardson*, 7 Q. B. D. 388, that a parent who sends his child to a Board School without paying the fees when he is able to pay them does not cause the child to attend school, even though the child be admitted to the school and receive instruction, makes it at any rate possible, though it may not be easy for a School Board to enforce attendance. The decision further shows the extent to which, under the English Constitution, the operation of the law is controlled by the judges. If the judgment in *London School Board* v. *Wright*, 12 Q. B. D. 578, had gone in favour of the appellants, the coercive powers of the School Board would have been doubled. If the *London School Board* v. *Wood* had been determined against the Board, the coercive powers of the Boards would have ceased to exist. The practical effect and operation of the Education Acts depends therefore in reality though not in name upon the opinion formed by the judges as to the authority conferred on the Board by the words of the Act, and this opinion must inevitably be greatly influenced by judicial opinion as to the expediency of compulsory education. *In re Flint*, 15 Q. B. D. 488, shows also that the Courts of Law can fix the limits of the authority exercised not only by School Boards, but by courts martial. All this seems to Englishmen a matter of course, but a Prussian or Frenchman would, it may be suspected, be greatly surprised if a judge tried to interfere with the authority of officials called upon to enforce national education or of officers entrusted with the discipline of the national army. Some years ago a Dutch candidate for a Doctor's degree at Leyden called attention to this difference between English and Continental administration in a thesis of considerable merit on the English Habeas Corpus Act.

It is not often that a decision on the law of bankruptcy has in it a touch of humour, but it is impossible to read *Ex parte Ridgway*, 15 Q. B. D. 447, without a slight sense of amusement. Colonel Ridgway in 1866, after the birth of his son Tom, purchases a pipe of wine and lays it down in his cellar. The wine is from that time known in the family as 'Tom's port.' When Colonel Ridgway gets into difficulties this family joke is used as a serious argument to prevent Tom's port from becoming the property of the trustee in bankruptcy. The judges naturally enough would not treat domestic jocosity as a valid argument against the rights of creditors. Oddly enough, however, Justice Cave strengthens a decision which needs no elaborate argument in its favour by an argument of dubious validity. 'Was it intended,' he asks, 'that when the boy got to sixteen or seventeen he should be free to drink [the wine] at his pleasure, or to exchange it for a gun, for instance, or a horse?' and thence infers that since Tom would certainly not be allowed to get drunk on his wine, the wine could not be Tom's. We cannot see how this conclusion follows. If Tom had received the wine out and out from an uncle or from a friend, it would have been out and out his own; yet if Tom had drunk it without leave he would probably not have escaped a deserved flogging. An infant owns many things which he cannot use at his own free will.

What is a 'cause of action'? This is an enquiry which, as we have before pointed out, perplexes the judges because it forms part of the wider enquiry what is a cause, which has perplexed logicians and metaphysicians. *Serrao* v. *Nowel*, 15 Q. B. D. 549, if it does not carry legal speculations as to the nature of causation much further, settles one or two elementary points which every practitioner will do well to master and bear in mind. The first is that where there is but one cause of action, 'damages must be assessed once for all.' The second is that the existence of several remedies in respect of one cause of action is quite a different thing from the existence of several causes of action. The last point is that the Queen's Bench Division and the Chancery Division 'are divisions of one court, and that court administers one law.' This is certainly, we should have supposed, common knowledge, but since an eminent judge 'seems,' in the opinion of the Master of the Rolls, 'to have inadvertently supposed that the Court of Chancery still exists,' it is well that ordinary persons should be from time to time reminded by the Court of Appeal that 'now there is no Court of Chancery.'

A notion prevails among laymen, and perhaps also among lawyers, that since the passing of the Married Women's Property Act, 1882, a married woman can contract as if she were a *feme sole*. For the practical purposes of ordinary life, this idea may be correct enough, but according to the decision of Pearson, J., *In re Shakespear*, 30 Ch. D. 169, the Act only empowers a married woman to contract so as to 'bind her separate property,' and that the distinction between unlimited contractual capacity and the theoretically limited power of binding a particular kind of property may lead to important practical results. Thus if X, a married woman, has, at the time she contracts, no separate property, she cannot by any contract bind separate property which she may thereafter acquire. Persons dealing with married women will have to bear this decision in mind, unless and until the Court of Appeal hold otherwise. But we think the point capable of more argument than it appears to have received.

Some errors die hard: of nothing is this more true than the perverse dogmas which advocates in want of an argument attempt to force into the law of domicil. To judge by the reasoning employed for the defendant in the case of *In re Macreight*, 30 Ch. D. 165, many lawyers are not yet able to master the elementary principle that a soldier or sailor in the service of his own sovereign, retains wherever he may be stationed the domicil which he had on entering the service. Yet this doctrine, which is a certain deduction from the nature of domicil and the characteristics of modern military service, has been for years laid down and expounded by text writers, and has been not much more than a year ago formally approved by the Court of Appeal (*Ex parte Cunningham*, 13 Q. B. D. (C. A.), 418). It may be hoped that the judgment of Pearson, J., *In re Macreight*, will at least impress upon the profession the certainty of a doctrine which is really beyond question, and will further check attempts to draw artificial distinctions between the legal incidents of a domicil of origin and the legal incidents of a domicil of choice. This is a matter of considerable importance. Domicil is in any case a somewhat too artificial conception to form a good test as to the existence or non-existence of legal rights, and every additional subtlety which adds to the uncertainty of a complex branch of the law leads to certain inconvenience and to possible injustice.

It may be of some interest to trace the Roman origin of the current phrase 'damnum sine iniuria.' Ulpian wrote (D. 9. 1, *si quadrupes*, 1. § 3): 'Pauperies est damnum sine iniuria facientis datum, nec enim potest animal iniuria fecisse, quod sensu caret.' This, it will be seen, is in a very special context, and by no means warrants the use of 'damnum sine iniuria' as a common formula. It was adopted in the Institutes (4. 9, *pr.*) with the unidiomatic variant 'iniuria*m* fecisse,' and thence, probably through Azo, must have given rise to the modern usage. In Gaius 3. 211, on the lex Aquilia, we read: 'Iniuria autem occidere intellegitur cuius dolo aut culpa id acciderit, nec ulla alia lege damnum quod sine iniuria datur reprehenditur.' This shows that 'damnum sine iniuria dare' was a correct if not a common phrase, though it could never signify for Gaius or Ulpian 'harm [of any kind] which gives no cause of action.' 'Damnum sine iniuria' standing alone as a sort of compound noun, seems hardly good Latin. English lawyers, however, have so used it since the fifteenth century at latest.

Nearly sixty years ago, Charles Butler, the editor of Coke's commentary, and a master of real property law, wrote thus (Reminiscences, vol. 2. p. 285) on the complaints then rife of the complication and expense of conveyancing. 'SIMPLIFY, says the conveyancer, THE LAW OF TITLE TO PROPERTY,—*its niceties and subtleties will vanish*, and the *field of litigation*' (he is using the phrases of the Real Property Commissioners, then fresh) 'respecting the transfer of it will be prodigiously narrowed.' And again (p. 290):—'Is it wished to get rid of this length and embarrassment altogether?—The law of England must be altered.' Much has been done, well and skilfully done, to remove or mitigate the defects of the law as it stood fifty or sixty, nay ten years ago. But it remains as true as when Butler said it that the machinery of the law cannot be simple while the substance is complex. We cannot have cheap and easy transfer with an intricate system of limited ownership and charges. The landowners and the people of England must choose which they will do without.

We have received the Calendar of the Law School of Dalhousie University, Halifax, Nova Scotia, for the current academical year, and are glad to notice this rule: 'Moot Courts will be held frequently, and will be presided over by a member of the faculty, or by some practising barrister. Every candidate for a degeee will be required to take part, when called upon by the faculty, in arguments at the Moot Court, unless specially excused.' Truly Nova Scotia is in advance of the mother country in this matter. When will the good example now set by Gray's Inn alone be taken up by the Inns of Court as a whole, and the moot revived as an integral part of our law school? One teacher has, on his own responsibility, turned the final lecture of a course into a moot on an imaginary case raising an unsettled point in the subject, and the experiment succeeded as well as a solitary experiment could. But that is not enough.

The tendency of questions of law to encroach upon questions of fact has been checked by a decision of the Court of Appeal, which contains the record of one of Lord Halsbury's earliest judicial actions: *Swinburn* v. *Ainslie*, 30 Ch. D. 485. Whether a tree—larch or what not—has become a chattel or not does not depend on its capacity for living and growing, but on the pure question of fact whether it is or is not fairly detached from the soil. If it remains affixed to the soil, it is realty; if severed, personalty; and no further definition or direction will be given. According to the unsuccessful counsel, the Court knows that larch trees have no tap roots. This is a point of judicial notice which the Court did not decide, neither will we commit ourselves to an opinion.

Gandy v. *Gandy*, C. A., 30 Ch. D. 57, illustrates in various ways the difficulties that beset the enforcement of the covenants in a separation deed. Arrangements of this kind, having to struggle on the one hand against the common law rule that a wife cannot contract with her husband, on the other hand against the conscientious repugnance of the ecclesiastical courts, attained only a scant and tardy recognition in courts of equity. But for Lord Westbury (who loved not bishops nor their courts) having had the decision of a leading case, *Hunt* v. *Hunt*, 4 D. F. J. 221, and an appeal from him to the House of Lords having dropped (see 8 App. Ca. 421), their position would still be less favourable than it is.

Clark v. *Clark*, 10 P. D. (C. A.) 188, gives on the other hand an instance of the unwillingness of the Courts to favour suits for the restitution of conjugal rights, and the quotation from a judgment of Sir James Hannen, in which that eminent judge states that he has never known an instance in which such a suit was instituted for any other purpose than to enforce a money demand, not only justifies the judgment of Lord Justice Baggallay, in which it is cited, but also suggests the enquiry whether a form of action which is never used for its avowed purpose should continue any longer to exist.

The case of *Russell* v. *Watts* in the House of Lords, 10 App. Ca. 590, shows a remarkable division of judgments: the opinion which prevailed, being in a majority in the House, was that of Bacon V.C., Lindley L.J., Lord Selborne and Lord Fitzgerald. The minority, certainly a weighty one, consists of Cotton and Fry L.JJ. and Lord Blackburn. It is satisfactory that the difference turns not on any general principle of law, but on the construction and effect of particular private instruments with reference to their particular circumstances.

We have received a second edition of Mr. Joseph Foster's '*Men at the Bar*,' which we noticed on its first appearance (L. Q. R. vol. i. p. 388). This edition contains some additional and later information; but we are sorry to find that errors of the class we formerly pointed out for the most part remain uncorrected. Many of them would have been avoided by timely use of such ordinary sources of information as university calendars and catalogues of current literature. It is unsatisfactory that, after attention has been called to them, they should still disfigure an undoubtedly useful publication.

The *Digest of Cases* hitherto published with this Review has been found, even with the utmost possible compression, to occupy an amount of space which it is exceedingly difficult to reserve for it, and for which there are other uses more obviously appropriate to the purposes of the REVIEW. We have therefore decided to discontinue it, but must express our best thanks to Mr. Edward Manson for the industry, skill, and patience which he has bestowed on the experiment.

The Title-page and Index completing the first volume of the LAW QUARTERLY REVIEW are issued with the present number. In accordance with the decision expressed in the foregoing note, the quarterly Digests published with Nos. 2, 3, and 4 will not form part of the volume.

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No. 345. Technical Objections and Escapes from Justice—No. V—Earldom of Mar Restitution Act—Recent Cases in the Law of Sale—Parliament House Sketches—The Origin and History of the High Court of Justiciary, No. VIII—Reviews, Notes, Notes of Cases, etc.

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The Scottish Law Review and Reports of Cases. Vol. I, Nos. 10, 11, and 12, for October, November, and December, 1885. Glasgow: Wm. Hodge & Co.

No. 10. The Registration Courts—Judicial Statistics for 1884—Sists in Small Debt Cases—The Agricultural Holdings Act—Obituary Notices, Current Notes, etc., Reports.

No. 11. The Law of 'Pactional Rent' in Agricultural Leases, ii.—Constructive Conversion—Publication of University Lectures—Obituary Notices, Current Notes, etc., Reports.

No. 12. Dying Depositions—Reviews—Obituary Notices—Notes, Reports, Digest of Cases, and Indices for 1885.

Canada Law Journal. Vol. XXI, 1885. Toronto: C. Blackett Robinson.

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The Canadian Law Times. Vol. V, Nos. 8, 9, 10 and 11, August, September, October, and November, 1885. Toronto: Carswell & Co.

No. 8. Satisfaction and Discharge of Bills, Notes and Cheques—Creditors' Remedies against Companies—Editorial Review—Notes.

No. 9. Vendor and Purchaser—Insurance—Jurisdiction of the Court of General Sessions of the Peace in the Province of Ontario—Editorial Review—Notes.

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The Manitoba Law Journal. Vol. II, Nos. 8, 9, 10, and 11, 1885. Winnipeg: R. T. Richardson.

No. 8. Appeals upon questions of fact—A Lawyer's Cabinet—The Golden Rule—Notes—Reports.

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No. 11. Contributory Negligence—The Law Reports—The Bradlaugh Cases—Second Action for New Damage—*Interest Reipublicæ ut sit finis litium*—Notes—Reports.

The Cape Law Journal. Vol. II, Parts 4 and 5, August and October, 1885. Grahamstown: for the Incorporated Law Society of the Cape of Good Hope, Richards, Slater & Co.

Part 4. Some Remarks on Drafting—Kaffrarian Deeds Registry—Mr. Leigh Hoskyns—Leading Cases in Cape Law—New Rules of Court—Digest of Cases.

Part 5. Contracts of Minors—Leading Cases in Cape Law—Digest of Cases, Notes, etc.

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No. 2. Reports in Supreme Court, U.S., Massachusetts, Wisconsin; Superior Court of Cincinnati, etc.—Notes—Current Items—Digest.

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1–2. Local Italian by-laws on compulsory purchase, etc. (Tamassia)—The place of attempts in criminal law (Civoli)—Legal MSS. at Pistoia (L. Chiappelli)—The XII. Tables in relation to Heraclitus and Pythagoras (A. Chiappelli)—Reports, Reviews, etc.

3–4. *Reversio ad dominum* and the *lex Atinia* (Gandolfo)—Points in the Italian Civil Code (Lordi)—Compulsory purchase, etc., concluded (Tamassia)—German monographs in R. L. (Landucci)—Luigi Bellavite (Polacco)—Notes, Reviews, etc.

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Vol. II, Part 11. Digest of Italian mercantile cases, 1884–5, with references to contemporary publications*.

* The 'Bibliografia Dottrinale' includes review articles as well as separately published works.

Il Filangieri: Rivista Giuridica Italiana di Scienza, Legislazione e Giurisprudenza. Vol. X, Nos. 8, 9 and 10, August, September and October, 1885. Naples.

No. 8. Ratification of acts bad in form (De Crescenzo)—Sull' insequestrabilità delle azioni nella Società anonima cooperativa (De Tullio)—Mandate in the Italian Commercial Code (Marghieri)—Reviews, Notes, Russian draft law on Bills of Exchange*.

No. 9. Ratification, etc., concluded (De Crescenzo)—Inaugural speeches at opening of sittings of Courts of Cassation, Rome and Turin (Editor)—Commercial Code, Art. 709 (V. Ercole)—Reviews—German Law of 1884 on compulsory insurance against accident*.

No. 10. Marriage brokage in modern Italian Law (Lomonaco)—On some proposed amendments of draft Italian Penal Code (Napodano)—Proposals for International Bills of Exchange Law (Marghieri)—Compositions with creditors (Salvia)—Reviews, etc.—German Insurance Law, 1884, concluded*.

* The part entitled 'Legislazione Comparata' is a separately paged Appendix.

Busch's Archiv. Berlin. Vol. XLVI, Part 4.

Interest on Negotiable Instruments (Ortloff)—A question on retrospective operation of the German Company Law of 1884 (R. Esser)—Notes of Cases, Reviews.

Centralblatt für Rechtswissenschaft. Stuttgart. Vol. V, Parts 1–3. October —December, 1885.

Critical and bibliographical notices. Prof. König, always diligent in keeping the readers of the Centralblatt informed about the literature of the Common Law, contributes to No. 2 a general review of English and American law-books for 1880–1885. In No. 3 is a review of Mr. Seebohm's 'English Village Community' from the same hand.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.